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IN THE UNITED STATES SUPREME COURT

Luanne Walton,

Petitioner,

vs.

Johnson & Johnson Services, Inc.,
Ortho-McNeil Pharmaceutical, Inc.,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Petition for a Writ of Certiorari

Stephen M. Katz
Counsel of Record
for Petitioner Luanne Walton
Suite 130
4401 Northside Parkway
Atlanta,Georgia 30327
Telephone: 404.848.9658

QUESTION PRESENTED FOR REVIEW

Whether a tangible employment action occurs as a matter of law when a supervisor's sexual harassment, which includes rape, renders the employee completely disabled from work and there are no prior acts by the supervisor which a reasonable person could conclude are actionable sexual harassment?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

All of the parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit are completely and correctly listed in the caption.

TABLE OF CONTENTS

Part I.	Question Presented for Review. . . .	i
Part II.	Parties to the Proceeding in the United States Court of Appeals for The Eleventh Circuit.	ii
Part III.	Table of Contents.	iii
Part IV.	Table of Authorities.	iv
Part V.	Statement of the Basis for Jurisdiction	1
Part VI.	Statute Involved in This Case	2
Part VII.	Statement of the Case.	2
Part VIII.	Statement of the Facts	
A.	Preliminary Statement	2
B.	Facts	2
Part IX.	Argument	10
Part X	Appendix A.....	A-1
Part XI	Appendix B.....	A-35

PART IV.

TABLE OF AUTHORITIES

28 U.S.C. § 54(1) 1

Burlington Industries; Inc. v. Ellerth, 524 U.S. 742,
118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) 9, 10

Faragher v. City of Boca Raton, 524 U.S. 775,
118 S.Ct.2275, 141 L.Ed.2d 662 (1998) 9, 10

Greene vs. Dalton, 164 F.3d 671
(D.C. Cir. 1999) 13, 14

Harris vs. Forklift Systems, Inc., 510 U.S. 17,
114 S.Ct. 367, 126 L.Ed.2d 295 (1993) 4, 13, 14

Lathem vs. Department of Family & Children's
Svcs., 172 F.3d 786 (11th Cir. 1999) 11

Mendoza vs. The Borden Company, Inc.,
195 F.3d 1238 (11th Cir.1999) 4, 13, 14

Pennsylvania State Police vs.
Suders, 124 S.Ct. 803 (2003).....1, 11

Reed vs. MBNA Marketing Systems, Inc.,
333 F3d 27 (1st Cir. 2003) 13, 14

Suders vs. Easton, 325 F.3d 432 (3d Cir. 2002).....12

Walton vs. Johnson & Johnson, Inc.,
347 F.3d 1272 (11th Cir. 2003) 1

PART V.
STATEMENT OF THE BASIS FOR JURISDICTION

(i) The judgment by the Court of Appeals was entered October 20, 2003. This petition is timely filed pursuant to Rule 13, The ninetieth (90^{th}) day after the judgment was rendered was Sunday, January 18, 2004 and the clerk's office at the United States Supreme Court was closed for the Martin Luther King, Jr. federal holiday on January 19, 2004.

(ii) There has been no request for rehearing or rehearing *en banc* before the United States Court of Appeals for the Eleventh Circuit, nor has there been a request to extend the time to file this petition for a Writ of Certiorari.

(iii) The statutory provision conferring jurisdiction on this Court is 28 U.S.C. § 1254(1) and the opinion below is reported at *Walton vs. Johnson & Johnson Services, Inc., Ortho-McNeil Pharmaceutical, Inc.*, 347 F.3d 1272 (11^{th} Cir. 2003).

(iv) Walton submits that this case should be consolidated for argument with *Pennsylvania State Police vs. Suders*, 124 S.Ct. 803 (2003)(cert. granted). On December 1, 2003, this Court granted *Suders'* petition for a Writ of Certiorari to decide the question whether a constructive discharge constitutes a tangible employment action. Because Walton was rendered disabled by her supervisor's sexual harassment, the facts in Walton's case present a far more compelling example of behavior that constitutes a tangible job action.

The reason Walton requests consolidation with *Suders* is more fully set forth in the Argument below. Alternatively, if the Court declines to consolidate Walton's case for argument with *Suders*, Walton requests that this Court grant her petition for a writ of certiorari and, after rendering a judgment in Suders, remand Walton's case to the Eleventh Circuit in light of the principles set forth in the Court's decision in *Suders*.

PART VI.
STATUTE INVOLVED IN THIS CASE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* is the only statute directly involved in this case

PART VII.
STATEMENT OF THE CASE

Basis for Federal Jurisdiction in the United States Court of Appeals for the Eleventh Circuit:

The basis for federal jurisdiction in the Eleventh Circuit is that it was an appeal as a matter of right from a final judgment of a United States District Court involving a federal statute, i.e. Title VII. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 42 U.S.C. § 2000e *et seq.*

PART VIII.
STATEMENT OF THE FACTS
A. Preliminary Statement

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, federal courts are required to construe the facts on a motion for summary judgment in favor of the non-movant.

Respectfully, Walton asserts that in some instances the Statement of Facts set forth in the Eleventh Circuit's Opinion are incorrect or construed in a manner that favors the Respondent. Walton has indicated herein where her statement of facts differs from that of the Eleventh Circuit and provides the source she relies upon.

B. Facts

Walton worked as a pharmaceutical sales representative ("PSR") for Respondent Ortho for a number of years preceding the events in question. Like most PSR throughout the industry, Walton worked out of her home, spending much of her time calling on

doctor's offices in an effort to persuade doctors to write prescriptions for Ortho products. Each PSR reported directly to a district manager.

In January 1999, Ortho went outside the company and hired George Mykytiuk ("Mykytiuk"), of Eli Lilly, to work as the district manager for the Tampa area. Mykytiuk was Walton's direct supervisor. In accordance with Respondent's rules, Mykytiuk's office was located in his home. There is no dispute that Respondent requires employees and district managers to work out of their homes, thus making Mykytiuk's home the "locus of authority" for the PSRs he managed. Mykytiuk began supervising Walton in February, 1999. Prior to June 29, 1999, the first time Walton was raped by Mykytiuk, she had met him 3 times.[1]

On June 14, 1999, Mykytiuk was scheduled to drive with Walton while she made her calls. Instead, Mykytiuk directed Walton to go shopping with him, took her to a movie, and told her to accompany him to dinner. Mykytiuk tried to hold Walton's hand during the movie, and, when they parted company that evening, he tried to kiss her. After Walton told Mykytiuk that his behavior was inappropriate, he apologized and promised never to do it again.

The next day, June 15, Mykytiuk traveled with Walton while she made her calls, ostensibly for the purpose of observing her performance in the field. At some point during the day, Mykytiuk indicated that he needed to go to his office, which was at his apartment, in order to finish some inventory paperwork. In accordance with Mykytiuk's directions, Walton accompanied him to his apartment.

When Mykytiuk finished his paperwork, he told Walton that he did not feel like working the rest of the day. He began talking about his marital difficulties and picked up a gray box and pulled out

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[1] In its opinion, the Eleventh Circuit indicates that Walton alleges to have been raped. Walton maintains that this fact should be considered true in order to construe the facts in a light most favorable to Walton under Rule 56. Walton testified that she had been raped and at least one psychiatrist hired by Respondent concluded that Walton exhibited the symptoms of a rape victim. Walton was found to have been disabled by the Social Security Administration as a result of the injuries inflicted upon her by the harasser.

some letters his wife had written him. He asked Walton to read the letters aloud. At some point thereafter, Mykytiuk took a gun out of the box and showed it to Walton. Later, when Walton was about to leave, Mykytiuk grabbed Walton's breasts and buttocks and attempted to kiss her. She again told him that this behavior was inappropriate, and again he apologized and assured Walton the behavior would not happen in the future.

Walton attributed Mykytiuk's behavior to the fact that his wife had recently filed for divorce after engaging in an extra-marital affair. The Eleventh Circuit found as a matter of fact that Walton was not intimidated by Mykytiuk's display of the firearm. Walton contends that this factual finding by the Eleventh Circuit that Mykytiuk's display of the firearm in the locus of authority is clearly erroneous in that the Eleventh Circuit failed to construe this fact in a light most favorable to Walton.

A couple of days later, Mykytiuk told Walton that she would function as his "assistant district manager," and gave her a key to his apartment and security code to enter the premises of the apartment complex. Mykytiuk told her that he considered her an assistant manager and that she needed to have access to his office in case he was out of town and needed something faxed to him.

Prior to June 29, 1999, it is undisputed that Walton had met Mykytiuk only three (3) times. The facts also establish that Mykytiuk's suggestive behavior and attempt to kiss Walton were done in the context of Mykytiuk forcing Walton to spend work time listening to his marital woes. There is no real dispute that Mykytiuk's attempt to kiss and touch Walton could even be mistaken for as severe enough to state a cause of action under Title VII. *See Mendoza vs. The Borden Company, Inc.*, 195 F3d 1238 (11th Cir. 1999) *citing Harris vs. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

More than a week later, on June 29, 1999, Walton hosted a dinner program for 95 nurse practitioners, a program Mykytiuk demanded to attend. The record reflects that it was unusual for a district manager attend a dinner program for to nurse practitioners. Usually, district managers did not attend such events unless the

dinner was for physicians with significant relationships with Respondent.

After the dinner was over, Mykytiuk directed Walton to follow him to his home, the locus of authority under the employer's rules. Mykytiuk told Walton that he wanted to recap the program once they got there. When she arrived at Mykytiuk's apartment, he offered her a glass of wine, which she accepted, but did not drink. He pulled out the gray box, removed the gun, and placed it back in the box after talking about it for a few moments.

Mykytiuk continued to talk about his marital difficulties. He next began to compliment Walton, telling her what a good friend she had been to him. Walton testified that Mykytiuk then jumped on top of her and began to kiss her. Walton testified that she told him "no" and tried to push him away, and that despite her efforts, he physically entered her without her consent. She testified that she fell into a state of shock and that she believes she was raped again. Later that evening, after Mykytiuk carried her into his bedroom. Several health professionals who examined Walton confirmed that her symptoms and mental state was that of a rape victim, a fact that was not construed by either the District Court or the Eleventh Circuit in favor of Walton.

The next day, Walton called in sick. She returned to work later that week, and about a week later, on July 8, she attended a lunch business meeting with Mykytiuk. After the meeting, Mykytiuk directed her to give him a ride back to his apartment. At that time Mykytiuk again raped Walton. It is undisputed that the testimony shows that, after the alleged assault, Mykytiuk apologized to Walton. Walton and Mykytiuk's testimonies both reveal that Walton was crying so hard that Mykytiuk was compelled to bring her ice packs because her eyes were swollen shut. Walton contends that this fact was not construed by the courts below in her favor as required by Rule 56, F.R.Civ.P.

Mykytiuk told Walton that it would not happen again and that they would have a professional relationship in the future. Walton told her husband the next day that Mykytiuk had tried to kiss her and that he was calling her a lot, making her life very stressful.

Though Walton was able to avoid Mykytiuk in the days immediately following the July 8 assault, Mykytiuk continued with his incessant phone calls, phoning her 20 to 30 times per day. Walton then decided to contact Mykytiuk's psychologist, Dr. Karen Cervenka, hoping that she could persuade Mykytiuk to stop his advances.

The record establishes that despite the fact that PSRs have to report to managers in the managers' homes, the Respondent's sexual harassment policy does not contain a name of a person to contact or a telephone number to report sexual harassment.

On July 21, 1999, Walton had a meeting with Dr. Cervenka. At that meeting, Walton told Dr. Cervenka that one of her patients, George Mykytiuk, was harassing Walton at work. Dr. Cervenka asked Walton whether she had sex with Mykytiuk, and Walton told her that she had, but that she did not "want to." Dr. Cervenka arranged for Walton and Mykytiuk to have a joint session (called a "conjoint" session) to discuss these issues on July 26, 1999. At the conjoint session, Mykytiuk agreed to desist from calling Walton or ask her to his apartment for meetings.

There are no facts set forth in Dr. Cervenka's file which would indicate that Walton stated or implied the sexual intercourse with Mykytiuk was consensual. Importantly, Mykytiuk agreed that he would not direct Walton to be alone with him at any meetings.

Mykytiuk, however, violated that agreement on numerous occasions. He showed up uninvited at her Walton's house, wanting to go water skiing. And, after driving Walton to a meeting in Orlando on August 21, 1999, Mykytiuk invited Walton to his room so that he could review her "good sales numbers." Though she initially refused, Mykytiuk persuaded her that she could trust him. Once there, he tried to hug and kiss her, and he managed to fondle her breasts and buttocks over her objection.

A few days later, on August 26, 1999, after a business dinner, Mykytiuk allegedly pressed Walton to have sex with him again and tried to hug and kiss her. Walton refused and pushed him away. The next day, August 27, 1999, Mykytiuk asked Walton to give him a ride home after they met with another sales representative in a nearby town. Walton returned to Mykytiuk's apartment, this time for

the purpose of using the restroom. While there, Mykytiuk purportedly handed her a "Victoria's Secret" catalogue and told her to pick out anything she wanted. During this time period, Mykytiuk continued to make harassing phone calls. At some point in July, Walton had confided to Kim Van Goidstnoven, a friend who worked at one of Ortho's sister companies (a company under the Johnson & Johnson umbrella), that Mykytiuk was acting inappropriately toward Walton. Van Goidstnoven talked about this with some of her managers at that company, and they told Van Goidstnoven that Walton should contact the human resources department and file a complaint. Respondent's sexual harassment policy did not contain a telephone number or the name of a person Walton or other women could contact to report sexual harassment.

On September 3, 1999, after numerous attempts to get Mykytiuk to stop his sexual advances and harassing behavior, Walton reported Mykytiuk by making an anonymous call to Respondent's human resources department. Walton told Angela Taylor, one of Respondent's human resources representatives, about the June 14-15 incidents in which Mykytiuk had made inappropriate advances and attempted to kiss and fondle her.

The record establishes that Respondent's sexual harassment policy provided to Walton contained neither a contact name nor a telephone number to report sexual harassment. However, the manual does contain telephone numbers for other purposes, such as sales.

Taylor asked Walton to file a complaint and told her that, based on the information from the call, Taylor already knew who she was and who she was complaining about. After thinking it over the following weekend, Walton called Taylor on September 7, 1999, and named Mykytiuk as the person who made the inappropriate advances. At the time she limited her complaint to the June 14-15 incidents. Taylor informed Walton that Renee Ralph, who was on vacation, would be taking over the investigation. Three days later, Ralph traveled to Tampa and spent several hours interviewing Walton.

Three days later, on September 13, 1999, Ralph interviewed Mykytiuk. He told Ralph that he and Walton had been involved in an

intense and consensual affair, and that Walton had initiated some of the encounters, facts which Walton has consistently and vehemently denied to Respondent and under oath. Ralph suspended Mykytiuk, with pay, at the end of the interview with pay.

On September 17, 1999, Dr. Cervenka called Walton and told her that Mykytiuk's wife had subpoenaed Cervenka's session notes in connection with Mykytiuk's divorce proceeding. She told Walton that the notes would reveal that Mykytiuk and Walton had been having an affair. Walton completely and fully disputed this account, but Dr. Cervenka informed her that she could no longer discuss the matter.

On September 20, 1999, Walton called Mykytiuk's manager, Cathy Wichert, to inform her that, in addition to the other incidents previously reported, Mykytiuk had raped her. That same day, Walton reported the rapes to the Tampa Police Department.

Wichert relayed the rape allegation to Ralph, who then returned to Florida to conduct another interview with Walton. Mykytiuk was also re-questioned by Respondent's officials, and he attempted to provide company investigators with detailed information to support his claim that the affair was entirely consensual. Virtually every detail that Mykytiuk conveyed to Respondent's investigators was contradicted by objective evidence. By way of example, Mykytiuk repeatedly told Ortho investigators that he had consensual sex with Walton in his Tampa apartment on June 21, but changed his story after it became apparent that Walton was in Virginia on that day.

Respondent's "investigation" concluded that, at the very least, they could not rule out the "possibility" of consensual sex.

Respondent did not discharge Mykytiuk until December 31, 1999. Thus, Mykytiuk was paid from September 13, 1999 until his termination on December 31, 1999. There is no indication why it took from September 13 until December 31 for Respondent to finish remedial action by terminating Mykytiuk.

Shortly thereafter, Ralph invited Walton and her husband to New Jersey for a briefing on the close of the company's

investigation. Ralph and Alan Saleeba, Johnson & Johnson's Director of Security, told Walton that they could not conclude that she had been raped and that they were unable to exclude the possibility of a consensual affair. Upon hearing the news, the Waltons were upset and demanded to see someone from upper management. Walton complained, among other things, about the fact that Respondent had not interviewed a number of witnesses who could support her version of the events. On January 12, 2000, Michael Carey, Chief Human Resources Officer for Johnson & Johnson, met with the Waltons. Carey listened to their concerns but told them that he had confidence in the integrity of the investigation. He also told Walton that he would be happy to help her return to work, even if it meant placing her in another position in the Johnson & Johnson family.

After the rapes, Walton went on leave and, pursuant to company instructions, applied for short term disability. A physician retained by Respondent's disability administrator confirmed that Walton was indeed disabled as a result of the rape. Short term disability benefits expired May 16, 2000. As aforesaid, an independent medical examination confirmed that Walton was in fact disabled due to Mykytiuk's sexual harassment. The Social Security Administration also granted Walton's application for disability benefits without opposition. While Walton was disabled as a result of Mykytiuk's conduct, Respondent terminated her employment on May 17, 2000.

In the district court, Respondent moved for summary judgment, contending that the disability caused by Mykytiuk's rape and confirmed by an independent medical examination and the Social Security Administration, leave did not constitute an adverse, tangible employment decision. Accordingly, the District Court held that Walton's claim for sexual harassment was subject to the affirmative defense recognized by this court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

The district court concluded that Ortho was entitled to summary judgment on the basis of the *Faragher* defense. The district

court held that there was no genuine issue of material fact as to whether Respondent acted reasonably to prevent and then promptly correct any sexually harassing behavior. In addition, despite the fact that Respondent's policy did not contain a contact person or telephone number to report sexual harassment, the district court concluded that Walton failed to take advantage of Respondent's anti-harassment policy, and that her failure to do so could not be considered reasonable under the circumstances. The court therefore entered summary judgment on behalf of Respondent with respect to Walton's sexual harassment claim under Title VII.

Walton contends that a disability, (i) caused by a supervisor's sudden sexual harassment, and (ii) which renders an employee unable to work constitutes a tangible job as a matter of law, if there were no prior acts by the supervisor that could reasonably be construed as actionable sexual harassment.

PART IX.
ARGUMENT

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), this Court defined a "tangible employment action" as "a significant change in employment status," often but not always, resulting in economic injury. *Ellerth*, 524 U.S. at 761-62, 118 S.Ct. 2257. The non-exclusive list of tangible employment actions included "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761-62, 118 S.Ct. 2257.

It is well-established, that the affirmative defense set forth in the *Faragher-Ellerth* cases is unavailable to employers where the supervisor's sexually harassing conduct results in a tangible employment action.

In the instant case, the district court and the Eleventh Circuit rejected Walton's argument that her disability, confirmed by an independent medical evaluation and the Social Security Administration, constituted a tangible employment action. Despite the fact that evidence from psychiatrists and other health

professionals, which evidence is required to be construed in favor of Walton, established that Mykytiuk's sexual harassment/rape caused the career ending disability (Walton had never suffered from any form of mental or emotional injury before the sexual harassment), the courts below held that Walton's disability was not a tangible employment action. [2]

Walton's argument is analytically distinct from the argument raised by the plaintiff in *Suders*.[3] Suders claims that her voluntary resignation from employment constituted a tangible job action by the employer because no reasonable employee would continue employment under those circumstances. Walton, on the other hand, argues that where a supervisor's sexual harassment renders a subordinate employee disabled, the sexual harassment constitutes a tangible job action as a matter of law, at least where no reasonable person could believe that the supervisor's actions prior to the events causing the disability could constitute actionable sexual harassment.

In *Suders*, there is no question that the plaintiff voluntarily terminated her employment and was not rendered disabled by any

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[2] The Eleventh Circuit's decision appears to be inconsistent with its prior a decision which held that an employee was not required to mitigate damages where an employer's discriminatory conduct caused the disability. *Lathem v. Department of Children and Youth Services* 172 F.3d 786 (11th Cir. 1999) In *Lathem*, competent testimony from a psychiatrist established that the defendant's discriminatory conduct rendered the plaintiff disabled. There is no way to reconcile the Eleventh Circuit's rule that an employer caused disability is not a tangible job action with its rule that an employee rendered disabled by the employer's discriminatory conduct is not required to look for work. In both instances, the employer's conduct has rendered the employee unable to work. The Eleventh Circuit's holding in Walton eviscerates its previous ruling in *Lathem*. For if a career ending disability caused by an employer's discriminatory conduct is not a tangible job action, then there is no reason for the rule that an employee does not have to mitigate damages if she is rendered disabled by the employer's discriminatory conduct.

[3] In its decision below the Eleventh Circuit declined to consider whether Walton was "constructurally discharged", holding that Walton's trial counsel warned such an argument. The Eleventh Circuit's analysis misses a crucial distinction. A Constructive discharge is a voluntary act by an employee. Walton's disability resulting in discharge was an involuntary act by the supervisor, not voluntary in any sense of the word. It was the unlawful acts of the supervisor that ended Walton's employment.

act on the part of a supervisor. In the instant case, Walton suffered career ending disability after she was raped by her supervisor the fourth occasion she worked with him. There is an ocean of difference between Suders' voluntary act of quitting employment and Walton's involuntary termination due to disability.

In the first instance, the sexually harassing acts which occurred before Suders resignation met the standard for severity. Since a reasonable person in Suders place could conclude that acts constituted sexual harassment, it can be forcefully argued that Suders should have used the employer's sexual harassment complaint procedure. Instead, Suders "pulled the plug" on her own employment without first reporting the sexual harassment to superiors.[4] Because Suders failed to provide her employer with notice and an opportunity for remedial action, there is a good argument to be made that the termination was not ratified by the employer. *Suders*, 325 F.3d at 458.

The facts in Walton's case present a far more compelling argument that the supervisor's sexual harassment constituted a tangible employment action. Walton presents a compelling argument that the sexual harassment visited upon her is a tangible employment action attributable to the employer for two reasons.

First, the employer's complaint procedure would not have helped Luanne Walton. Prior to the June 29th rape, Walton suffered no sexual harassment which could be considered actionable by any reasonable person. On two occasions between June 14 and June 29, Mykytiuk attempted to kiss Walton and touch her inappropriately. After Walton firmly refused Mykytiuk's advances, and Mykytiuk promised never to do it again. Before the June 29th sexual assault, Walton had every reason to believe that Mykytiuk would comply because she saw him a third time and he made no attempt to kiss or touch her, nor did was he inappropriate in any way. *Walton*, 347 F.3d at 1275-76.

Respondent's sexual harassment policy, even if effective, would not have saved Walton from the sexual assault.

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[4] While the Third Circuit's opinion reveals that Suders complained, the complaint occurred two days before Suders resigned her employment.

Walton understands that in the usual course of things, a plaintiff need not suffer psychological damage to have an actionable claim of sexual harassment. *See Harris vs. Forklift Systems, Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993) (". . .Title VII comes into play before the harassing conduct leads to a nervous breakdown."). Thus, it may well be reasonable to require a plaintiff to report a supervisor's actions that may constitute sexual harassment before a plaintiff suffers a disability or psychological damage. This is nothing but a restatement of the familiar principle that a person must do everything in her power to avoid harm.

But where, as here, no reasonable person could believe that any of the supervisor's acts occurring *prior to* disability-causing sexual harassment are actionable, it is unreasonable to say that an act of sexual harassment such as rape that causes a disability does not constitute a tangible job action because the victim failed to report acts that no reasonable person could believe are actionable under Title VII. Courts which have addressed this matter directly have specifically held that it is not unreasonable for victims not to report "low level sexual harassment." *Reed vs. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 36-38 (1st Cir. 2003); *Greene vs. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). And it is no answer to say, as the district court below stated, that an employee's application for disability benefits due to a supervisor's rape was a voluntary termination by the employee.

It is simply illogical to tell an employee raped by a supervisor that she has no cause of action because she should have reported prior acts by her supervisor that no reasonable person would find to be actionable sexual harassment under Title VII. This is precisely what the district court and the Eleventh Circuit told Luanne Walton. Before the first rape on June 29, 1999, Mykytiuk attempted to kiss and touch Walton. There is no argument that a reasonable person would have considered Mykytiuk's behavior severe enough to be actionable under Title VII, especially given the fact that Mykytiuk acted properly the meeting before the rape. *See Mendoza vs. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999)(en banc); *Harris vs. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

The second reason that Walton presents a compelling argument that her employer-caused disability is a tangible job detriment is that it ended her career as a pharmaceutical sales representative and rendered her unable to work. Suders was capable of performing work despite the sexual harassment; Walton was rendered incapable of performing work.

The Eleventh Circuit's determination that Walton should have reported Mykytiuk's attempt to kiss and grab her merely illuminates the error in that court's analysis. There is little question that Mykytiuk's acts prior to the June 29th rape were not conduct which a reasonable person could conclude violated Title VII. *Harris*, supra; *Mendoza*, supra. Indeed, in the meeting just prior to the June 29th rape, Mykytiuk engaged in no sexually harassing behavior. Walton was entitled to conclude that Mykytiuk had heeded her demand to stop the sexually harassing behavior.

Greene vs. Dalton, 164 F.3d 671 (D.C. Cir. 1999), a case with facts virtually identical to Walton's case (the rape in both cases occurred June 29th), the employer argued that the plaintiff inexcusably delayed reporting sexual harassment, thus precluding her sexual harassment claim when she was later raped. That court held that it was the defendant's burden to come forward with evidence from which a reasonable person could conclude that the plaintiff should have reported the harassment earlier. Where, as here, no reasonable person could conclude that the behavior occurring before the rape violated Title VII, a cause of action based on severe and pervasive harassment is not barred for lack of notifying the employer. *Reed*, 333 F.3d at 36-37.

The point for Walton's case is that her failure to report prior acts of her supervisor which she had no duty to report means that the career ending rape on June 29 that rendered her disabled constituted such a substantial change in circumstances arising to a tangible employment action. The fundamental point is that the employer's reporting mechanism, even if effective, would not have helped Luanne Walton avoid the June 29th rape and resulting career ending disability.

This 20th day of January, 2004.

Respectfully submitted,

Stephen M. Katz

Suite 130
4401 Northside Parkway
Atlanta, Georgia 30327
Telephone: 404.848.9658
Facsimile: 404.233.6877

Part X
Appendix A

United States Court of Appeals,
Eleventh Circuit.

Luanne WALTON, Plaintiff-Appellant,
v.
JOHNSON & JOHNSON SERVICES, INC., Ortho-McNeil Pharmaceutical, Inc.,
Defendants-Appellees.

No. 02-12520.

Oct. 20, 2003.

Employee brought Title VII sexual harassment and hostile work environment action against employer. The United States District Court for the Middle District of Florida, No. 00-01897-CV-T-30MAP, James S. Moody, Jr., J., 203 F.Supp.2d 1312, granted summary judgment for employer, and employee appealed. The Court of Appeals held that: (1) employee's choice, while receiving short-term disability benefits, to end active employment status in order to preserve eligibility for long-term benefits was not an adverse "tangible employment action" precluding employer's assertion of *Faragher/ Ellerth* affirmative defense; (2) employer's failure to check prospective supervisor's references or contact his current employer before hiring him did not constitute failure to prevent sexual harassment; (3) employer exercised reasonable care to prevent sexually harassing behavior; (4) employer acted reasonably to correct any harassment by promptly interviewing employee and supervisor and suspending supervisor; and (5) employee failed to take advantage of employer's anti-harassment policy by waiting to complain until two and one- half months after first incidents.

Affirmed.

Claire Saady, Lutz, FL, for Plaintiff-Appellant.

Terence G. Connor, Marlene Rodriguez, Lisa Rothberg Askowitz, Morgan, Lewis & Bockius, LLP, Miami, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and WILSON, Circuit Judges, and O'KELLEY [FN*], District Judge.

FN* Honorable William C. O'Kelley, United States District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

Luanne Walton appeals the district court's grant of summary judgment in favor of her employer, Ortho-McNeil Pharmaceutical, Inc. ("Ortho"). Walton sued Ortho under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, claiming that the company was responsible for sexual harassment committed by her supervisor. The district court concluded that although there was a genuine issue of material fact as to whether there was actionable harassment, the employer was entitled to summary judgment on the basis of the affirmative defense recognized by the Supreme Court in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Walton appeals that decision.

I. BACKGROUND

In reviewing the district court's summary judgment order, we must consider all of the evidence in the record, viewing it in the light most favorable to the non-moving party's claims. *See Frederick v.*

Sprint/United Mgmt. Co., 246 F.3d 1305, 1309 (11th Cir.2001). Accordingly, the following account is drawn from the record evidence, viewed in the light most favorable to Walton's allegations.

Walton worked as a pharmaceutical sales representative ("PSR") for Ortho for a number of years preceding the events in question. In 1997, she requested and received a transfer from Virginia to Tampa, Florida. Like many other PSRs, Walton worked out of her home, spending much of her time calling on doctor's offices in an effort to persuade doctors to write prescriptions for Ortho products. Each PSR reported directly to a district manager, and the district manager would sometimes accompany the PSR on his or her calls (called a "drive-with").

In January of 1999, Ortho went outside the company and hired George Mykytiuk, of Eli Lilly, to work as the district manager for the Tampa area. Mykytiuk had been referred to Ortho by one of its employees, Lou Ferrerra, who was himself a former Eli Lilly employee. Though Mykytiuk did not directly supervise employees during his tenure at Eli Lilly, he had worked as a national account manager, and based on his business experience in the pharmaceutical industry, Ortho's regional business director, Cathy Wichert, felt that he would be the best candidate for the job. Wichert contacted two other Ortho employees who worked at Eli Lilly while Mykytiuk was there in order to confirm that he had been working in the position he claimed he was. Though the company, when it hired Mykytiuk, did a background investigation (including a criminal history check), it did not contact his then-current employer or check any of his references. [FN1]

> FN1. Ortho, like many companies, has a policy of not contacting current employers due to fears that prospective hires might be terminated from their current position if their employer knew that they were interviewing with another company.

Mykytiuk was Walton's direct supervisor. Mykytiuk, like the PSRs, worked out of his home office. [FN2] In April, Walton told

Mykytiuk that she was interested in obtaining a promotion to a hospital representative position. Mykytiuk told her that he was well-connected to upper management and that he could assist her in getting the promotion.

> FN2. At one time, Ortho maintained office space for district managers and PSRs to meet and conduct business, but that practice was apparently discontinued many years ago.

On June 14, 1999, Mykytiuk was scheduled to drive with Walton while she made her calls. Instead, Walton claims that Mykytiuk asked her to go shopping with him, took her to a movie, and asked her to accompany him to dinner. Walton claims that Mykytiuk tried to hold her hand during the movie, and that when they parted company that evening, he tried to kiss her. Walton claims that she told Mykytiuk that his behavior was inappropriate and that he apologized and promised never to do it again.

The next day, June 15, Mykytiuk traveled with Walton while she made her calls, ostensibly for the purpose of observing her performance in the field. At some point during the day, Mykytiuk indicated that he needed to go to his office, which was at his apartment, in order to finish some inventory paperwork. Walton accompanied him to his apartment. When Mykytiuk finished his paperwork, he told Walton that he did not feel like working the rest of the day. He began talking about his marital difficulties and picked up a gray box and pulled out some letters his wife had written him. He asked Walton to read the letters aloud. At some point thereafter, Mykytiuk took a gun out of the box and showed it to Walton. Later, when Walton was about to leave, Mykytiuk grabbed Walton's breasts and buttocks and attempted to kiss her. She again told him that this behavior was inappropriate, and he again apologized and said it would not happen in the future.

A couple of days later, Walton, at Mykytiuk's request, came by Mykytiuk's apartment and accepted a key and security code to his apartment. Mykytiuk told her that he considered her an assistant manager and that she needed to have access to his office in case he

was out of town and needed something faxed to him.

More than a week later, on June 29, 1999, Walton hosted a dinner program for 95 nurse practitioners, a program that Mykytiuk attended. After the dinner was over, Mykytiuk complimented Walton on her performance. He told Walton that he was intoxicated and asked her to follow him home. He indicated that he wanted to recap the program once they got there. [FN3] When she arrived at Mykytiuk's apartment, he offered her a glass of wine, which she accepted. He pulled out the gray box, removed the gun, and placed it back in the box after talking about it for a few moments. Mykytiuk continued to talk about his marital difficulties. He next began to compliment Walton, telling her what a good friend she had been to him. He then purportedly jumped on top of her and began to kiss her. Walton claims that she told him "no" and tried to push him away, and that despite her efforts, he physically entered her without her consent. She testified that she fell into a state of shock and that she believes she was raped again later that evening, after Mykytiuk carried her into his bedroom.

> FN3. In her deposition, Walton claimed that Mykytiuk asked her to come to his home in order to "recap" the meeting. Walton herself contradicts this version of events, however, as her notes indicate that Mykytiuk asked her to come over because he wanted to talk to someone about his marital problems.

Walton did not immediately report the alleged assault to either her employer or the police. The next day, Walton called in sick. She returned to work later that week, and about a week later, on July 8, she attended a lunch business meeting with Mykytiuk. After the meeting, he asked her to give him a ride back to his apartment. When she got there, she was offered and again accepted a glass of wine from Mykytiuk. He asked her to lie down on the floor so that he could give her a massage. She complied, and, according to Walton, Mykytiuk allegedly raped her yet again. After the alleged assault, Mykytiuk apologized to Walton, who was crying. He said that it would not happen again and that they would have a

professional relationship in the future.

Once again, Walton did not immediately report Mykytiuk's conduct to either her employer or the police. She did tell her husband the next day that Mykytiuk had tried to kiss her and that he was calling her a lot, making her life very stressful. Though Walton was able to avoid Mykytiuk in the days immediately following the July 8 assault, she claims that Mykytiuk continued with his incessant phone calls. Walton then decided to contact Mykytiuk's psychologist, Dr. Karen Cervenka, hoping that she could persuade Mykytiuk to stop his advances. [FN4]

> FN4. Mykytiuk had apparently mentioned that he had been seeing Dr. Cervenka in his conversations with Walton.

On July 21, 1999, Walton had a meeting with Dr. Cervenka. At that meeting, Walton told Dr. Cervenka that one of her patients, George Mykytiuk, was harassing Walton at work. Dr. Cervenka asked Walton whether she had sex with Mykytiuk, and Walton told her that she had, but that she did not "want to." Walton never told Dr. Cervenka that Mykytiuk had raped her. Dr. Cervenka arranged for Walton and Mykytiuk to have a joint session (called a "conjoint" session) to discuss these issues on July 26, 1999. At the conjoint session, Walton and Mykytiuk worked out a 30-day agreement in which he was to no longer call Walton or ask her to his apartment for meetings. In addition, Walton was not to be alone with Mykytiuk at any meetings.

Mykytiuk, however, allegedly violated that agreement on numerous occasions. He showed up uninvited at her house, wanting to go water skiing. And, after driving Walton to a meeting in Orlando on August 21, 1999, Mykytiuk invited Walton to his room so that he could review her "good sales numbers." Though she initially refused, Mykytiuk persuaded her that she could trust him. Once there, he tried to hug and kiss her, and he managed to fondle her breasts and buttocks over her objection. A few days later, on August 26, 1999, after a business dinner, Mykytiuk allegedly pressed Walton to have sex with him again and tried to hug and kiss her.

Walton refused and pushed him away.

The next day, August 27, 1999, Mykytiuk asked Walton to give him a ride home after they met with another sales representative in a nearby town. Walton returned to Mykytiuk's apartment, this time for the purpose of using the restroom. While there, Mykytiuk purportedly handed her a "Victoria Secret's" catalogue and told her to pick something out for herself.

During this time period, Walton claims that Mykytiuk continued to make harassing phone calls. At some point in July, Walton had confided to Kim Van Goidstnoven, a friend who worked at one of Ortho's sister companies (a company under the Johnson & Johnson umbrella), that Mykytiuk was paying too much attention to her. Van Goidstnoven talked about this with some of her managers at that company, and they told Van Goidstnoven that Walton should contact the human resources department and file a complaint. Van Goidstnoven relayed this advice to Walton in mid-August of 1999.

On September 3, 1999, more than two months after the July 8 assault, Walton finally reported Mykytiuk by making an anonymous call to Ortho's human resources department. Walton told Angela Taylor, one of Ortho's human resources representatives, about the June 14-15 incidents in which Mykytiuk had made inappropriate advances and fondled her. Taylor pushed Walton to file a complaint and told her that, based on the information from the call, Taylor already knew who she was and who she was complaining about. After thinking it over the following weekend, Walton called Taylor on September 7, 1999, and named Mykytiuk as the person who made the inappropriate advances. At the time she limited her complaint to the June 14-15 incidents. Taylor informed Walton that Renee Ralph, who was on vacation, would be taking over the investigation. Three days later, Ralph traveled to Tampa and spent several hours interviewing Walton. Walton did not mention the fact that she had been raped; she simply told Ralph that Mykytiuk paid too much attention to her and that he had tried to hug and kiss her on a couple of occasions.

Three days later, on September 13, 1999, Ralph interviewed Mykytiuk. He told Ralph that he and Walton had been involved in

an intense and consensual affair, and that Walton had initiated some of the encounters. Ralph suspended Mykytiuk at the end of the interview.

On September 17, 1999, Dr. Cervenka called Walton and told her that Mykytiuk's wife had subpoenaed Cervenka's session notes in connection with Mykytiuk's divorce proceeding. She told Walton that the notes would reveal that Mykytiuk and Walton had been having an affair. Walton purportedly disputed this account, but Dr. Cervenka informed her that she could no longer discuss the matter. Walton then decided to tell her husband that Mykytiuk had raped her on multiple occasions.

On September 20, 1999, Walton called Mykytiuk's manager, Cathy Wichert, to inform her that, in addition to the other incidents previously reported, Mykytiuk had raped her. That same day, Walton reported the alleged rapes to the Tampa Police Department. [FN5]

> FN5. After reviewing Walton's claims, the Tampa Police Department declined to press charges against Mykytiuk.

Wichert relayed the rape allegation to Ralph, who then returned to Florida to conduct another interview with Walton. Mykytiuk was also re-questioned by Ortho officials, and he provided Ortho investigators with detailed information to support his claim that the affair was entirely consensual. The investigators interviewed a number of other individuals and ultimately concluded that the affair was consensual, or that, at the very least, they could not rule out such a possibility.

Ortho, however, decided to discharge Mykytiuk for exercising poor judgment. Mykytiuk was formally discharged on December 31, 1999. [FN6] Shortly thereafter, Ralph invited Walton and her husband to New Jersey for a briefing on the close of the company's investigation. Ralph and Alan Saleeba, Johnson & Johnson's Director of Security, told Walton that they could not conclude that she had been raped and that they were unable to exclude the

possibility of a consensual affair. Upon hearing the news, the Waltons were upset and demanded to see someone from upper management. Walton complained, among other things, about the fact that Ortho had not interviewed a number of witnesses who she claimed could support her version of the events. On January 12, 2000, Michael Carey, Chief Human Resources Officer for Johnson & Johnson, met with the Waltons. Carey listened to their concerns but told them that he had confidence in the integrity of the investigation. He also told Walton that he would be happy to help her return to work, even if it meant placing her in another position in the Johnson & Johnson family.

FN6. Though he was not formally discharged until December 31, 1999, Mykytiuk remained on suspension from September 13, 1999 until the date of his discharge.

Walton, however, never returned to work for Ortho or any other Johnson & Johnson company. She went on leave shortly after she reported Mykytiuk's conduct to Ortho officials, and she began collecting short-term disability benefits under Ortho's disability plan. Those benefits expired on May 16, 2000. On May 12, 2000, Ortho informed Walton that her short-term disability benefits were about to expire, and that she had two options. She could either seek long-term disability benefits, assuming she was qualified after an independent medical evaluation, or she could return to work. The company notified her that in order to collect long-term disability benefits, her active employment status would have to be terminated. Walton ultimately decided to go on long-term disability, collecting benefits under that plan until February 2002, when a reviewing physician determined that she was no longer disabled. Her employment with Ortho was terminated on May 17, 2000, when Walton failed to return to work. This suit followed.

In the district court, Ortho moved for summary judgment, contending that Walton's request to go on disability leave did not constitute an adverse, tangible employment decision and that as a result, any claim she might have against Ortho relating to Mykytiuk's alleged harassment would have to be in the form of a hostile work

environment claim. Ortho conceded, at least for purposes of summary judgment, that Walton was subjected to unwelcome sexual harassment. The company argued, however, that it was entitled to summary judgment based on the affirmative defense recognized by the Supreme Court in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (hereinafter "*Faragher* defense").

The district court concluded that Ortho was entitled to summary judgment on the basis of the *Faragher* defense. The district court held that there was no genuine issue of material fact as to whether Ortho acted reasonably to prevent and then promptly correct any sexually harassing behavior. In addition, the court concluded that Walton failed to take advantage of Ortho's anti-harassment policy, and that her failure to do so could not be considered reasonable under the circumstances. The court therefore entered summary judgment on behalf of Ortho with respect to Walton's sexual harassment claim under Title VII.

II. STANDARD OF REVIEW

We review a district court's order granting summary judgment *de novo,* viewing the facts in the record in the light most favorable to the non-moving party, and drawing all inferences in that party's favor. *See Frederick v. Sprint/United Mgmt. Corp.,* 246 F.3d 1305, 1311 (11th Cir.2001). "Summary judgment is only proper if there are no genuine disputed issues of material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

III. DISCUSSION

Title VII makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex...." 42 U.S.C. § 2000e-2(a)(1). Noting that the phrase " 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the spectrum of disparate treatment of men and women in employment," the Supreme Court in *Meritor Savings Bank, FSB v. Vinson* held that

intangible forms of discrimination, such as being forced to work in a sexually hostile work environment, constitute actionable discrimination under Title VII. 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). Not all forms of conduct that may be described as "harassment," however, affect a "term, condition, or privilege" of employment within the meaning of Title VII. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67, 106 S.Ct. at 2405 (alteration in original) (internal quotation marks and citations omitted). *See also Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (noting that a hostile work environment exists under Title VII where "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' ") (quoting *Meritor,* 477 U.S. at 65, 106 S.Ct. at 2405).

[1] To establish a hostile work environment claim under Title VII, a plaintiff must therefore show the following:

> (1) that [she] belongs to a protected group; (2) that [she] has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as [the employee's sex]; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir.2002). For summary judgment purposes, Ortho apparently concedes that there is a genuine issue of material fact as to whether Walton was subjected to unwelcome sexual harassment. The company also does not contest the fact that a genuine issue of material fact exists as to whether that harassment was so severe and/or pervasive that it created a hostile working environment. The sole issue before this Court as it relates to Walton's claim of discrimination under Title VII is whether Ortho can be held vicariously liable for the actions of Mykytiuk.

The Supreme Court first touched on the issue of employer liability

for the harassing conduct of supervisory employees in *Meritor*. In light of the factual record, the Court was unwilling to provide a definitive rule on the subject. It did, however, reject the two most extreme positions with respect to employer liability. It rejected the notion "that employers are always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408 (citing Restatement (Second) of Agency § § 219-237). Conversely, the Court rejected the proposition that "absence of notice to an employer ... necessarily insulate[s] that employer from liability." *Id.* (citing Restatement (Second) of Agency § § 219-237 (1958)). Other than marking these boundary lines, the Court in *Meritor* merely indicated that courts should look to traditional principles of agency law in deciding whether an employer is liable for the harassing conduct of one of its employees, though the Court cautioned that those "common-law principles may not be transferable in all their particulars to Title VII...." *Id.*

[2] The Supreme Court revisited the question of employer liability for the harassing conduct of supervisory employees in *Ellerth* and *Faragher*. In *Frederick v. Sprint/United Management Co.*, we summarized the Court's holdings:

> In *Ellerth* and *Faragher*, the Supreme Court indicated that courts should no longer use the labels "quid pro quo" and "hostile environment" to analyze whether an employer should be held liable on an employee's Title VII claim concerning a supervisor's sex-based harassment. *Ellerth*, 524 U.S. at 753, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633; *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (applying new standard). Instead, when analyzing whether an employer should be held liable for a supervisor's harassment, courts should separate these cases into two groups: (1) harassment which culminates in a "tangible employment action," such as discharge, demotion or undesirable reassignment, and (2) harassment in which no adverse "tangible employment action" is taken but which is sufficient to constructively alter an employee's working conditions. *Ellerth*, 524 U.S. at 761-63, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633; *Faragher*, 524 U.S. at 790, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662; *see also Johnson v. Booker T. Washington Broadcasting Serv., Inc.*, 234 F.3d 501, 508 (11th Cir.2000) (recognizing shift in terminology). Under this analysis, when a supervisor engages in

harassment which results in an adverse "tangible employment action" against the employee, the employer is automatically held vicariously liable for the harassment. *Ellerth,* 524 U.S. at 763, 118 S.Ct. 2257, 141 L.Ed.2d 633; *Faragher,* 524 U.S. at 790, 118 S.Ct. 2275, 141 L.Ed.2d 662. In contrast, when the supervisor's harassment involves no adverse "tangible employment action," an employer can avoid vicarious liability for the supervisor's conduct by raising and proving the affirmative defense described in the *Faragher* and *Ellerth* cases ("*Faragher /Ellerth* affirmative defense"). *Ellerth,* 524 U.S. at 765, 118 S.Ct. 2257, 141 L.Ed.2d 633; *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275, 141 L.Ed.2d 662. 246 F.3d 1305, 1311 (11th Cir.2001). Walton claims that Ortho's termination of her employment, following her request for long-term disability benefits, constitutes a tangible employment action to which no affirmative defense is available. Alternatively, she insists that a genuine issue of material fact exists as to whether Ortho satisfied the requirements of the *Faragher* affirmative defense. We address these claims in turn.

A. Does Walton's Claim Of Harassment Satisfy The Tangible Employment Action Requirement.

[3] Walton contends that she suffered a tangible job detriment when Ortho terminated her from active service on May 17, 2000. In order to obtain long-term disability benefits, Walton's active employee status had to be terminated. Ortho informed Walton of this fact, and notified her that on May 17, 2000, she could return to work or go on long-term disability leave. Walton ultimately decided to collect the disability benefits and did not return to work. Consequently, on May 17, 2000, Ortho removed her from active service. Walton claims that the discharge itself amounts to a tangible employment action. She claims that because the disability was the product of her supervisor's harassment, any discharge resulting from that disability must be charged against the company.

As the Supreme Court recognized in *Ellerth,* "[w]hen a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis." 524 U.S. at 759-760, 118 S.Ct. at 2268. When a

company official makes a tangible employment decision, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-62, 118 S.Ct. at 2269. Thus, "[w]hatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate." *Id.* at 762-63, 118 S.Ct. at 2269. A discharge is unquestionably a tangible employment decision. *See id.* at 761, 118 S.Ct. at 2268 ("A tangible employment action constitutes a significant change in employment status, such as hiring, *firing,* failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change of benefits.") (emphasis added). There is, therefore, no question but that Walton's discharge constitutes a tangible employment action.

The problem for Walton is that there is absolutely no evidence in the record that she was discharged (as opposed to being harassed) *because of her sex.* To the contrary, the undisputed evidence shows that Walton was discharged because she elected to take disability rather than return to work.

Walton claims that because the disability resulted from the harassment of one of Ortho's supervisors, there is a causal link between the harassment and the discharge. The question we must concern ourselves with, however, is whether Ortho, when it terminated Walton, took her gender into account. And there is no evidence that Ortho, or any of the employees acting on its behalf, considered Walton's gender when the company terminated her. [FN7] To the contrary, the undisputed evidence is that Walton was terminated because she failed to return to work after her short-term disability benefits expired in order to preserve her eligibility for long-term disability benefits. The district court therefore correctly determined that Walton was unable to establish a genuine issue of material fact as to the reason for Walton's termination.

> FN7. Though Mykytiuk's conduct may be imputed to Ortho (subject to the affirmative defense recognized in *Ellerth/Faragher*), Walton has not shown that he played a role in the decision to terminate her. In fact, when Ortho discharged Walton, Mykytiuk had already been terminated.

> To the extent that Walton claims that Mykytiuk's conduct precluded her from returning to work, that claim is properly considered as a constructive discharge claim, as we discuss *infra.*

[4] That is not to say that a company can escape liability where it ostensibly discharges an individual for not returning to work even though that individual was, as a practical matter, forced to resign by company officials. We permit plaintiff-employees to recover discharge damages when the plaintiff is "constructively discharged." To succeed on such a claim, the plaintiff, who bears the burden of proof, must show that her working conditions were "so difficult ... that a reasonable person would have felt compelled to resign." *Pipkins v. City of Temple Terrace, Fla.,* 267 F.3d 1197, 1201 (11th Cir.2001) (internal quotation marks and citations omitted). The plaintiff must do more than merely show that she was subjected to actionable harassment. "The standard for proving constructive discharge is higher than the standard for proving a hostile work environment." *Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208, 1231 (11th Cir.2001).

Walton did not attempt to prove that a reasonable person would have felt compelled to resign under the circumstances presented here. She instead focuses all of her attention on her subjective reaction to the alleged harassment. She insists that so long as an employee can show that she was forced to leave because of the harassment she experienced, the employer is liable for any resulting discharge. Accepting that position would eviscerate the objective standard for constructive discharge. In any case where a plaintiff could show that she was unable to continue working in the face of a sexually hostile working environment, even where the conditions were not sufficient to compel a reasonable person to resign, the employer would be responsible for any damages relating to the discharge. That position is clearly inconsistent with the objective test for constructive discharge adopted by our Circuit.

We need not decide whether a claim of constructive discharge would fail given the facts in the record. Because Walton did not press her constructive discharge claim in the court below, the district

court never squarely addressed the issue of whether a reasonable person would have felt compelled to resign under the circumstances. [FN8] Though we sometimes permit a party to raise legal issues they did not raise below, *see Dean Witter Reynolds, Inc. v. Fernandez,* 741 F.2d 355, 360-61 (11th Cir.1984) (noting several exceptions to the general rule that appellate courts will not consider an issue unless it was first presented to the trial court), we are unwilling to do so here because Walton's counsel expressly disavowed the notion that constructive discharge was even an issue in the case. *See* Pl.'s Br. in Opp. to Defs.' Mot. Summ. J. (noting that cases cited by the defendant "address an issue ... not present in this case," namely "whether a constructive discharge can qualify as a tangible job detriment under *Faragher* "). Thus, to the extent the district court erred in failing to construe Walton's tangible employment action claim as a constructive discharge claim, that error was invited by counsel and cannot be reviewed on appeal. *See Glassroth v. Moore,* 335 F.3d 1282, 1290 (11th Cir.2003) (recognizing the long-standing rule of appellate procedure that "a party may not challenge as error a ruling or other trial proceeding invited by that party.") (quotation marks and citations omitted).

> FN8. The district court did intimate that a constructive discharge claim would not lie here. Because Walton argued that constructive discharge was not an issue in this case, we offer no opinion as to the accuracy of the district court's observation.

In short, the undisputed facts conclusively demonstrate that Walton was discharged because she failed to return to work and that her gender played no motivating role in Ortho's decision. And, because Walton did not assert that she was constructively discharged as a result of the harassment by Mykytiuk, we need not decide whether a constructive discharge is a "tangible employment action" for purposes of the *Ellerth/Faragher* analysis. [FN9] *See Hardy v. Univ. of Illinois,* 328 F.3d 361, 364 (7th Cir.2003) (refusing to address constructive discharge because plaintiff, who claimed that she resigned and went on medical leave as a result of the alleged harassment, had not raised that claim in the court below). We

therefore turn to Walton's remaining claim, that she was subjected to a sexually hostile work environment. [FN10]

FN9. There is considerable disagreement among the circuits with respect to that issue. *Compare Suders v. Easton,* 325 F.3d 432, 461 (3d Cir.2003) (holding that a constructive discharge constitutes a tangible employment action under *Faragher/Ellerth*), *and Jaros v. LodgeNet Entm't Corp.,* 294 F.3d 960, 966 (8th Cir.2002) ("[A] constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the [*Faragher/Ellerth*] affirmative defense."), *with Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 294 (2d Cir.1999) (concluding that a "constructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher.*").

FN10. Walton argues for the first time in her reply brief that the alleged rapes on June 29, 1999 and July 8, 1999, by themselves, constitute tangible employment actions. We decline to address that argument because it was not raised below. As noted above, Walton argued in the district court (and in her initial brief) *only* that there was a tangible employment action because her discharge in May 2000 was the result of the sexual harassment. Indeed, in the district court, Walton expressly disavowed asserting a constructive discharge claim, which might be closely related to the issue now raised for the first time in her reply brief. Had Walton raised the issue in the district court, Ortho would have had an opportunity to respond thereto, and the district court would have addressed same. Ortho also may have been able to adduce additional relevant evidence.

B. Walton's Alternative Claim That Ortho Is Liable For The Hostile Work Environment Created By Her Supervisor.

Walton claims that she was subjected to a sexually hostile work environment, beginning in June 2000 and continuing up and until she

went on disability leave in September of that same year. For purposes of summary judgment, Ortho does not dispute the fact that there is a genuine issue of material fact as to whether Walton was subjected to unwelcome sexual advances, including multiple allegations of rape, during this time period. Ortho instead contends that it is not liable for this harassment under the terms of the affirmative defense recognized by the Supreme Court in *Ellerth* and *Faragher.*

In *Faragher,* the Supreme Court addressed the disparate standards used in the various circuits with respect to employer liability for the harassing conduct of supervisory employees. The Court began its analysis by noting that it was building on the foundation previously laid in *Meritor,* which as we noted *supra,* held that courts should look to traditional principles of the law of agency in defining employer liability. The Court then proceeded to address the three grounds for vicarious employer liability identified by the lower court: (1) liability under an "acting within the scope of employment" theory; (2) liability under an "aided by agency" theory; and (3) liability flowing from the employer's negligence.

[5] The Court declined to rely on the "scope of employment" theory, noting that courts had uniformly rejected (either explicitly or implicitly) the notion that co-workers act within the scope of their employment when they harass fellow employees. *Faragher,* 524 U.S. at 799-800, 118 S.Ct. at 2289. Because the Court, using the "scope of employment" theory, could not principally distinguish those cases from ones involving supervisory harassment, *see id.* at 800, 118 S.Ct. at 2289, the Court next addressed the idea that employers may be liable for supervisory harassment under an "aided by agency" theory. Specifically, the Court looked to Restatement (Second) of Agency § 219(2)(d), which provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless ... the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was *aided in accomplishing the tort by the existence of the agency relation.*" (emphasis added). Relying on this provision, the Court explained that "in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory

authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability" for supervisory harassment. *Faragher,* 524 U.S. at 802, 118 S.Ct. at 2290. The Court then provided several reasons for adopting this theory of liability:

> The agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise--[which may be] to hire and fire, and to set work schedules and pay rates--does not disappear ... when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion." Estrich, Sex at Work, 43 Stan. L.Rev. 813, 854 (1991). Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Id. at 803, 118 S.Ct. at 2291. The Court thus announced that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 807, 118 S.Ct. at 2292-93. [FN11]

> FN11. Because the Court endorsed the aided-by-agency theory of liability, it declined to rule on the question of whether the employer could be held responsible for supervisory harassment under a negligence or imputed knowledge theory. *See Faragher,* 524 U.S. at 810, 118 S.Ct.

at 2294.

[6][7] Ortho, for summary judgment purposes at least, does not contest the fact that Walton was subjected to an actionable hostile environment. [FN12] Nor does the company dispute the notion that, to the extent there was any unwelcome harassment here, Mykytiuk's position as a supervisor aided his ability to engage in harassing behavior. Thus, we assume for purposes of this appeal that Walton was subjected to an actionable level of harassment by her supervisor.

FN12. For sexual harassment to rise to the level where it alters the terms and conditions of employment, the work environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher,* 524 U.S. at 787, 118 S.Ct. at 2283. In addressing the objective hostility of the conduct, we look at four factors: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1246 (11th Cir.1999). We must then decide, looking at the totality of the circumstances, "whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment." *Id.*
Generally speaking, "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' " *Faragher,* 524 U.S. at 788, 118 S.Ct. at 2283. We can think of few incidents, isolated or not, that are more serious than those alleged to have occurred in this case. Because Ortho does not contest the fact that Walton was subjected to an actionable level of harassment, we assume that the allegations of fondling and sexual assault are sufficient to create a sexually hostile and abusive work environment that altered the terms and conditions of Walton's employment.

[8] Under the rule announced in *Faragher,* Walton has established a *prima facie* case for holding Ortho liable for Mykytiuk's alleged harassment. There is, however, an important qualification to *Faragher's* rule of vicarious liability. Though the Court indicated that an employer should be held vicariously liable for the harassment of its supervisors, it recognized that the rule it announced created some tension with its earlier pronouncement in *Meritor,* where it rejected the idea that an employer should be "always automatically liable for sexual harassment by their supervisors." *See Meritor,* 477 U.S. at 72, 106 S.Ct. at 2408; *Faragher,* 524 U.S. at 804, 118 S.Ct. at 2291 (describing the tension between the theory of liability it endorsed and the Court's earlier holding in *Meritor*). In the Court's view, there were two basic alternatives to the rule of automatic liability. The first was to recognize a rule whereby the harassing supervisor would have to affirmatively invoke his authority in order for the employer to be held liable. The Court rejected that idea because it was impractical in application and would lead to endless litigation over whether a supervisor's authority was implicitly invoked. *Id.* at 805, 118 S.Ct. at 2292. The Court then explained that:

> The other basic alternative to automatic liability would avoid this particular temptation to litigate, but allow an employer to show as an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with ... reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.

Id. Thus, the Court held that "[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. Rule Civ. Proc. 8(c)." *Id.* at 807, 118 S.Ct. at 2293. According to the Court, "[t]he defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

The district court granted Ortho summary judgment on the basis of this affirmative defense. It concluded that there was no genuine issue of material fact as to whether Ortho had taken reasonable measures to prevent and correct sexually harassing behavior. The district court also ruled for Ortho on the second element of the affirmative defense, holding as a matter of law that Walton unreasonably failed to take advantage of Ortho's remedial mechanisms or to otherwise avoid harm. We examine each of these issues in turn.

1. Whether Ortho Acted Reasonably To Prevent And Promptly Correct Sexually Harassing Behavior.

As we have previously recognized, in crafting the first prong of the *Faragher* affirmative defense, which in part requires employers to take reasonable measures to prevent harassment, "the Supreme Court sought to give effect to Title VII's deterrent purpose." *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297 (11th Cir.2000). The Court in *Faragher* "implied that employers could meet the initial burden in determining whether they had exercised reasonable care to prevent sexual harassment by promulgating an anti-harassment policy." *Madray*, 208 F.3d at 1297-98. In fact, "dissemination of an employer's anti-harassment policy [is] fundamental to meeting the requirement for exercising reasonable care in preventing sexual harassment." *Id.* at 1298.

In addition to promulgating an anti-harassment policy, an employer must also ensure that the policy itself adequately addresses Title VII's deterrent purpose. "The employer's size, location, geographic scope, organizational structure, and industry segment are just some of the characteristics that impact the analysis of whether the complaint procedures of an employer's anti- harassment policy adequately fulfill Title VII's deterrent purpose." *Id.* At a minimum, employers must "establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.' " *Id.* (quoting *Faragher*, 524 U.S. at 806, 118 S.Ct. at 2292 (alteration in original) (citations omitted)).

Walton claims that there is a genuine issue of material fact as to whether Ortho acted reasonably to prevent Mykytiuk's sexually harassing behavior. With respect to Ortho's efforts to reasonably prevent the harassing behavior, Walton points out that: (1) Ortho failed to check Mykytiuk's references or contact his current employer before hiring him; (2) Ortho discontinued its practice of leasing office space; and (3) Ortho's complaint procedure was defective because it failed to name the person to whom grievances should be submitted.

[9] The district court properly rejected each of these contentions. It is a common practice for employers to refrain from contacting a prospective employee's current employer before hiring that person. Should a company contact a candidate's current employer and then decide not to give that person an offer, the prospective employee might be out of a job altogether. Ortho did, however, talk to two employees who knew of Mykytiuk through their previous jobs at Eli Lilly. And, the company did conduct a criminal background check. Under the circumstances, we cannot say that a genuine issue of material fact exists as to whether Ortho acted reasonably to prevent harassing behavior based on Ortho's failure to conduct a more thorough investigation. We also note that there is no evidence that Mykytiuk was ever subjected to a claim of sexual harassment at his previous job and that a more diligent search, therefore, would have put Ortho on notice that Mykytiuk was likely to engage in such behavior in the future.

We also find no merit in Walton's contention that Ortho acted unreasonably by failing to secure office space for its employees. There were any number of public accommodations in which employees could (and often did) meet to discuss business matters. The fact that the company did not secure office space, therefore, does not suggest that it acted in an unreasonable manner to prevent harassment from occurring.

[10] Finally, we do not believe that the policy was defective because it failed to name the specific person to whom a grievance should be submitted. There is no dispute that Ortho promulgated an anti-harassment policy that was distributed to Walton. In pertinent part,

the policy provided that:

> Complaints of discrimination or harassment will be investigated and resolved by the *Human Resources Department.* If an associate feels he/she is the victim of discrimination or harassment, he/she should report it to their supervisor/manager. If this is not appropriate, the associate should request a confidential discussion with the appropriate Organizational Effectiveness representative.
>
> Upon impartial investigation, any associate found to have discriminated against or harassed another associate will be subject to immediate disciplinary action up to and including termination.

(emphasis added). The company's anti-harassment policy provides an alternative channel for making complaints other than the harassing supervisor. *Cf. Montero v. Agco Corp.*, 192 F.3d 856, 862 (9th Cir.1999) (concluding that company exercised reasonable care to prevent harassment where its policy identified only an employee's supervisor and the company's human resources department as the proper outlets for sexual harassment complaints), *cited in Madray*, 208 F.3d at 1299. Though the policy does not designate a specific "Organizational Effectiveness" representative, it clearly indicates that all complaints will be handled by the "Human Resources Department." If Walton had question as to who the "Organizational Effectiveness" representative referred to in the policy was, she could have contacted Human Resources and asked them. We think the policy sufficiently informs harassment victims that complaints should be addressed to that department. [FN13]

> FN13. In addition, Ortho claims that it sent a slightly different copy of its anti-harassment policy to its employees each year. A January 25, 1999 letter, addressed to "ALL OMP ASSOCIATES" notes that:
>
> Associates are encouraged to report incidents of harassment to their immediate supervisor. In instances where a supervisor may be involved in the incident, misconduct should be reported to a higher level of management or to a Human Resources Representative. We have an employee complaint procedure for investigating and resolving such complaints.
>
> To the extent that the policy manual created any confusion as to where complaints should be lodged, we believe this policy

clears up that confusion.
In her brief, Walton claims that she never received this letter. Her actual testimony is much more ambiguous, however. When asked why she never received a copy of the company's harassment policy, Walton said "if [Ortho officials] mail something out, they probably mail it out with a bunch of other stuff, easily to be thrown away. Who knows? Who knows if I even got it?" Walton also introduced testimony from another sales representative who did not recall getting such a letter. The fact that neither Walton nor another employee remember receiving the policy (as opposed to being able to definitely testify that they never received it), is not particularly probative of whether Walton did in fact receive a copy of the policy. In any event, we believe the policy manual provided employees with sufficient guidance about filing a complaint.

[11] Walton also contends that a triable issue of fact exists as to whether Ortho acted reasonably to correct the harassing behavior. Specifically, she claims that Ortho's failure to conduct a prompt and thorough investigation of her allegations excludes the possibility that the company acted reasonably in correcting the complained of harassment. We disagree. Walton first contacted Ortho's human resources department on September 3, 1999. After a follow up conversation a few days later, a member of that department arranged a meeting with Walton in Tampa on September 10, 1999. At that meeting, she indicated that Mykytiuk was paying too much attention to her and that he had attempted to kiss her and fondle her in June of 1999. Three days later, on September 13, 1999, the company's investigative staff met with Mykytiuk. He informed them that he and Walton had been involved in a consensual affair and that they had engaged in sexual intercourse on numerous occasions. At the end of the interview, Mykytiuk was immediately suspended from active service, where he remained until his discharge on December 31, 1999.

According to the EEOC, "[r]emedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur." EEOC Notice No.

915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, at § V.C.1.f. (June 18, 1999), *available at* http:// www.eeoc.gov/docs/harassment.html. Ortho's remedial measures did just that. Immediately after Walton filed a complaint with Ortho's human resources department, Ortho suspended Mykytiuk and took measures to ensure Walton would not have to work under him again. And, after conducting an investigation, the company ultimately discharged Mykytiuk. Walton was given an opportunity to return to active service, and she does not claim that she lost any benefits during the time in which she was employed at the company as a result of the alleged harassment.

Walton points to a number of claimed inadequacies in the investigation, such as the company's failure to interview critical witnesses and its failure to reconcile inconsistent statements from the witnesses who were interviewed. Had the company not taken reasonable measures to correct the harassment, Walton's complaints might have some merit. *Cf. Dhyne v. Meiners Thriftway,* 184 F.3d 983, 988 (8th Cir.1999) (concluding that an issue of fact existed as to whether employer's response to complaint of harassment was reasonable where the employer waited nearly two months after the employee's initial complaint before it transferred the alleged harasser). But where the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow. [FN14] We thus agree with the district court that there is no genuine issue of fact as to whether Ortho acted reasonably to prevent and correct sexually harassing behavior.

> FN14. Walton also claims that Mykytiuk made harassing phone calls to her even after he was suspended and that Ortho failed to adequately address that conduct. Walton, however, was unable to present Ortho with evidence of such calls prior to the date on which Mykytiuk was terminated. Thus, we cannot say that Walton made out a triable issue of fact on this question.
>
> Walton's chief complaint with Ortho's investigative process is that the company did not appear to believe her version of the events. The company, however, had good reason to doubt

her version of the events. Walton initially informed company officials that Mykytiuk made inappropriate advances and tried to fondle her in June of 1999. After interviewing Mykytiuk, the company learned that Walton and Mykytiuk had engaged in sexual intercourse. Walton subsequently amended her story and added multiple claims of rape, including her claim that she returned to the very same apartment where she was raped on multiple occasions. Given these facts, as well as the Tampa Police Department's decision not to charge Mykytiuk, the employer could have reasonably concluded that Walton, who is married, had been involved in a consensual affair with her supervisor. At the very least, the company could have reasonably concluded that they would not be able to exclude the possibility of a consensual relationship and that the safest course of action might be to terminate Mykytiuk for poor judgment and keep Walton in her former position. Because the employer quickly removed Mykytiuk from active service and ensured that he would not work with Walton in the future, we conclude that Walton failed to create a question of fact as to the reasonableness of the employer's conduct.

2. Whether Walton Unreasonably Failed To Take Advantage of Ortho's Remedial Measures or Otherwise Avoid Harm.

In order to succeed on the *Faragher* defense, the employer also bears the burden of proving the second element of that defense, "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to otherwise avoid harm." *Frederick v. Sprint/United Mgmt. Co.,* 246 F.3d 1305, 1313 (11th Cir.2001) ("Both elements [of the *Faragher* defense] must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements."). "[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, demonstration of such failure will normally suffice to satisfy the employer's burden under the

second element of the defense." *Faragher,* 524 U.S. at 807-08, 118 S.Ct. at 2293.

[12] In the court below, Ortho argued that Walton unreasonably failed to take advantage of the employer's anti-harassment policy by failing to report the alleged harassment, which began in mid-June of 1999, until September 3 of that same year. Walton responded in three ways. First, she claimed that she advised her supervisor that his advances were unwelcome. Second, she argued that she waited a mere five days after the last act of harassment to file a complaint and that there was, therefore, no unreasonable delay. Finally, she claimed that to the extent there was a delay in reporting the alleged harassment, that delay was reasonable because (a) she feared that she would not get the hospital representative position Mykytiuk had discussed with her, (b) she feared that she might lose her current job given Mykytiuk's purported connections to upper management, and (c) she feared for her safety after Mykytiuk showed her his gun while she was in his apartment. [FN15]

FN15. Walton also argues that Ortho was on notice of the harassment in August of 1999 because her friend, Kim Van Goidstnoven, told officials at Ortho's parent company that Walton's supervisor had made inappropriate advances. We agree with the district court that this argument lacks merit. Neither Van Goidstnoven, nor the officials she talked to at Johnson & Johnson, were charged with the responsibility of addressing such complaints, and the communication was not reasonably calculated to reach the responsible officials (i.e., Ortho's human resources department). *See Madray,* 208 F.3d at 1302 (holding that amorphous complaints to persons not authorized to accept complaints does not constitute a reasonable effort to take advantage of employer's complaint procedures). Indeed, as Van Goidstnoven's testimony makes clear, she did not file a complaint with the individuals at the sister company; she instead asked them what her friend, who worked at a related but distinct company, should do under the circumstances.

The district court correctly rejected these arguments. The fact that Walton advised her supervisor that his advances were unwelcome is relevant, of course, but she did not argue in the district court that, based on these warnings, she had reason to believe that the advances would stop, particularly after those warnings had already proven to be unsuccessful. [FN16] Furthermore, the fact that Walton waited five days after the last alleged incident of harassment is not very significant in assessing the reasonableness of her failure to report the harassment after it began in June. Had Walton notified Ortho officials in June, when the harassment initially began, most of the incidents complained of could have been avoided. Instead, after Mykytiuk groped her breasts and buttocks and tried to kiss her the day after he promised to behave, Walton claims that she went back to his apartment over a week later, knowing that he was intoxicated, had wine with him, and was then subjected to the more serious incident of sexual assault. Indeed, she admits returning to the apartment the following week, accepting wine again, and lying down on the floor to be massaged, whereupon she alleges that she was sexually assaulted again.

> FN16. If anything, the facts suggest the contrary. Walton warned Mykytiuk on June 14 that his advances, which included inappropriate comments and an attempt to kiss her, were unwelcome. Yet, just a day later, Mykytiuk allegedly committed a more egregious infraction when he fondled Walton's breasts and buttocks while attempting to kiss her.

We are mindful of the fact that severe harassment such as that which is alleged to have occurred here can be particularly traumatic. As we have pointed out before, however, "the problem of workplace discrimination ... cannot be [corrected] without the cooperation of the victims." *Madray,* 208 F.3d at 1302 (alteration in original) (quoting *Coates v. Sundor Brands, Inc.,* 164 F.3d 1361, 1366 (11th Cir.1999)). Thus, the victim of the alleged harassment has an obligation to use reasonable care to avoid harm where possible. *See Faragher,* 524 U.S. at 807, 118 S.Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably

have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."). As the First Circuit recently noted,

> Reporting sexually offensive conduct by a supervisor would for many or most employees be uncomfortable, scary or both. But because this will often or ordinarily be true, as the Supreme Court certainly knew, its regime necessarily requires the employee in normal circumstances to make this painful effort *if the employee wants to impose vicarious liability on the employer and collect damages under Title VII.*

Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 35 (1st Cir.2003). Here, Walton could have avoided most, if not all, of the actionable harassment by reporting Mykytiuk's behavior to Ortho officials. By failing to do so, Walton did not give Ortho an opportunity to address the situation and prevent further harm from occurring.

We also agree with the district court that absent a credible threat of retaliation, Walton's subjective fears of reprisal do not excuse her failure to report Mykytiuk's alleged harassment. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir.1999) (concluding that plaintiff's failure to report harassment for several months was not based on a "credible fear" that her complaint would fall on deaf ears or that she would suffer an adverse employment action as a result of her decision to file a complaint); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir.1999) (holding that plaintiff's subjective fear that she would suffer retaliation for filing a complaint not sufficient to excuse delay in reporting incidents of harassment). Subjective fears of reprisal may exist in every case, but, as we discussed *supra*, those fears, standing alone, do not excuse an employee's failure to report a supervisor's harassment. Here, Mykytiuk never told Walton that her job was in jeopardy, nor did he threaten her with physical harm. [FN17] We therefore conclude that Walton did not reasonably avail herself of the protections afforded by Ortho's anti-harassment policies, and the district court thus correctly held that Ortho was entitled to the *Faragher* defense as a matter of law.

> FN17. Walton did not indicate that Mykytiuk threatened her in any way when he showed her his gun. She merely

> indicated that the gun "intimidated" her. We have no quarrel with that claim, but we are unwilling to say that her subsequent failure to report Mykytiuk, when she was out of his presence, was reasonable due to her subjective fear that Mykytiuk might physically harm her. Indeed, the second prong of the *Faragher* defense would be rendered meaningless if a plaintiff-employee could escape her corresponding obligation to report sexually harassing behavior based on an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser.

On appeal, and for the first time, Walton argues that even if she acted unreasonably by failing to report many of these incidents after they occurred, she could not have avoided the sexual assaults on June 29, 1999. She thus contends that Ortho, at the very least, should be liable for the harassment that occurred on that date.

At least three other circuits have addressed, in some form, the practical difficulties of applying *Faragher* in cases involving claims of "sudden sexual harassment." The question faced in those cases is whether an employer is liable for the harassment committed by its supervisors where neither party is at fault--i.e., where the employer acts reasonably to prevent and correct any sexually harassing behavior, and where the employee avails herself, to the extent that she can do so, of any protections afforded by her employer. One circuit has held that an employer is liable for any harassment that occurred prior to the corrective action. *See Greene v. Dalton,* 164 F.3d 671, 674-75 (D.C.Cir.1999) (holding that the defendant could avoid liability in connection with a claim that a supervisor sexually assaulted a subordinate only if the defendant could show that the plaintiff failed to act reasonably in reporting the supervisor's behavior prior to the sexual assault). Two other circuits have addressed the issue but have not rendered a definitive holding. *See Todd v. Ortho Biotech, Inc.,* 175 F.3d 595, 598 (8th Cir.1999) (explaining that the *Faragher* defense, which was "adopted in cases that involved ongoing sexual harassment in a workplace, ... may not protect an employer from automatic liability in cases of single, severe, unanticipatable sexual harassment" and that the district court

should address that issue on remand) & 599 (Arnold, J., concurring) (noting that the affirmative defense in *Faragher* affects both liability and damages, and that in cases of sudden sexual harassment, the defense merely lessens the defendant's damages, it does not "erase the tort completely."); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 267 (5th Cir.1999) (opinion by Jones, J. with the other two panel members concurring in the judgment only, Judge Wiener concurring specially, *see infra*) (Judge Jones assumed *arguendo* that a hostile environment claim had been stated, albeit a dubious one, and concluded that the employer is not vicariously liable for actionable harassment where both the employee and the employer act reasonably and promptly to address the situation); 168 F.3d 795, 804 n. 52 (Wiener, J., specially concurring) (arguing that under *Faragher* and *Ellerth,* where a supervisor engages in "sufficiently severe conduct," such as rape, an employer may be vicariously liable even though the employer took prompt remedial action based on an employee's equally prompt complaint). The EEOC takes the position that an employer is liable where both parties act reasonably to prevent and correct any sexually harassing behavior. *See* EEOC Notice No. 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, at § V.B. (June 18, 1999), *available at* http:// www.eeoc.gov/docs/harassment.html. ("In some circumstances, ... unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee.... In these circumstances, the employer will be liable because the [*Faragher/Ellerth*] defense requires proof that it exercised reasonable legal care *and* that the employee unreasonably failed to avoid the harm.").

We need not weigh in on this debate because Walton failed to raise this theory below. In moving for summary judgment, Ortho argued that Walton had unreasonably failed to take advantage of its anti-harassment policies or otherwise avoid harm by failing to report Mykytiuk. According to Walton, the first incidents of sexually harassing behavior occurred on June 14 and 15 of 1999, when Mykytiuk allegedly fondled her and made inappropriate comments in her presence. Walton argued, among other things, that the delay in filing her complaint was reasonable due to her fear that she might lose her job. As we noted *supra,* that argument is simply not tenable here. Walton did not suggest in the court below that her failure to

complain prior to the sexual assault was reasonable because she had no reason to believe that there would be additional harassment. [FN18] The district court, therefore, had no occasion to decide whether a genuine issue of material fact existed as to the reasonableness of Walton's failure to report the earlier fondling incidents. As a general rule, we do not consider arguments raised for the first time on appeal. *See Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir.2001). Though there are exceptions to this rule, particularly in cases involving pure legal questions, *see, e.g., United States v. One Single Family Residence Located at 18755 North Bay Road, Miami,* 13 F.3d 1493, 1498 (11th Cir.1994) (addressing issue not raised below because it involved a pure legal question and failure to address it would have resulted in a miscarriage of justice), those exceptions do not apply here. [FN19] Consequently, we decline to consider Walton's claim that her employer is liable for any actionable harassment that occurred prior to and including the initial sexual assault. We conclude that Ortho is entitled, as a matter of law, to the *Faragher* defense and that, at least under the circumstances of this case, that defense is a complete one.

FN18. Walton did not, for instance, cite any of the cases discussed *supra* (*Greene, Todd*, or *Indest*) for the proposition that Ortho should be held liable for the sexual assault because that harassment was unavoidable.

FN19. Walton did argue below that her delay was reasonable because she told her supervisor that his advances were unwelcome. However, she did not focus in the district court on her protests with respect to Mykytiuk's June 14 pass at her nor her protests when his harassment escalated the very next day into groping of her breasts and buttocks. She did not argue that she was reasonable in believing that her protests as of that time would be sufficient to prevent any further harassment. Indeed, Walton made no specific argument with respect to the reasonableness of her actions before June 29. In other words, Walton made no argument singling out Ortho's liability for the alleged rape that occurred on June 29. Had Walton made such arguments below, defendants and the

district court could have addressed the reasonableness of Walton's actions as of that time to avoid harm. Indeed, it is possible that defendants might have been able to adduce additional evidence relevant to that discrete issue (e.g., additional evidence relevant to the reasonableness of Walton's accompanying an intoxicated Mykytiuk to the apartment that June 29 evening). Because Walton did not press this theory in the district court, we decline to entertain it for the first time on appeal.

The judgment of the district court is hereby AFFIRMED. [FN20]

FN20. We also affirm the district court's judgment with respect to Walton's other federal and state law claims. Because we conclude that her arguments in support of those claims are lacking in merit, an extended discussion of those claims is unnecessary.

347 F.3d 1272, 92 Fair Empl.Prac.Cas. (BNA) 1284, 16 Fla. L. Weekly Fed. C 1219

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Part XI
Appendix B

United States District Court,
M.D. Florida,
Tampa Division.

Luanne WALTON, Plaintiff,
v.
JOHNSON & JOHNSON SERVICES, INC., et al., Defendants.

No. 8:00-CV-1897-T-30MAP.

April 5, 2002.

Employee brought Title VII sexual harassment and retaliation action against employer which also alleged claims under Florida law for negligent supervision or retention, and intentional infliction of emotional distress. Employer moved for summary judgment. The District Court, Moody, J., held that: (1) employer's was eligible for affirmative defense to Title VII liability for supervisor's sexual harassment of employee; (2) employee did not suffer from adverse employment action for purposes of prima facie case of Title VII retaliation; (3) employer was not liable under Florida law for negligent supervision or retention; and (4) employer was not vicariously liable on claim for intentional infliction of emotional distress under Florida law.

Granted.

Terence G. Connor, Marlene Rodriguez, Morgan, Lewis & Bockius LLP, Miami, FL, Thomas C. Garwood, Jr., Kay L. Wolf, Ford & Harrison LLP, Orlando, FL, for Johnson & Johnson Services, Inc., Orth-McNeil Pharmaceutical, Inc, defendants.

Kalvin, M. Grove, Fox & Grove, Chartered, St. Petersburg, FL, Michael Keegan Kiernan, Abbey, Adams, Byelick, Kiernan, Mueller & Lancaster, L.L.P., St. Petersburg, FL, for George Mykytiuk, defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

MOODY, District Judge.

This cause came on for consideration upon Defendants' Motion for Case Dispositive Summary Judgment (Dkt.# 52), supporting memorandum (Dkt.# 53), Plaintiff's response thereto (Dkt.# 67) and Plaintiff's Motion for Partial Summary Judgment, supporting memoranda (Dkt.# 50) and Defendants' memorandum of law in opposition thereto (Dkt.# 73). The primary issue in both Plaintiff and Defendants' motions is a legally dispositive one in this case; that is, whether Defendants may avail themselves of the affirmative defense set forth by the United States Supreme Court in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). For the reasons set forth herein, the Court finds that Defendants may avail themselves of this defense, and when they do, the Court finds that final summary judgment is appropriate as there are no disputed issues of material fact as to Plaintiff's claims of sexual harassment and retaliation or as to her other state law claims.

I. *FACTUAL BACKGROUND*

There are myriad facts in this case, both disputed and undisputed, relating to Plaintiff's claims of sexual harassment and retaliation [FN1] and state law claims of negligent retention and intentional infliction of emotional distress. [FN2] At the summary judgment stage, the Court utilizes only the undisputed facts, taking all other facts in the light most favorable to Plaintiff.

> FN1. Plaintiff alleges violations of both federal (Title VII) and state law (Florida Civil Rights Act) for her claims of harassment and retaliation. These claims are analyzed under the same framework. *See Harper v. Blockbuster,* 139 F.3d 1385, 1387 (11th Cir.1998).

FN2. The infliction of emotional distress claim was also brought against the alleged harasser, Defendant George Mykytiuk. Plaintiff also filed a claim for assault and battery against Mykytiuk. Two months after the case was filed, Plaintiff and Mykytiuk filed a joint stipulation of dismissal with prejudice (Dkt.# 20) as to the claims against him, which was subsequently approved by this Court.

Plaintiff was employed by Defendant Ortho-McNeil Pharmaceutical Inc. (referred to hereinafter with Defendant Johnson & Johnson as "Defendants"), in Virginia Beach, Virginia, as a pharmaceutical sales representative since 1991. In 1997, Plaintiff obtained a lateral transfer as a sales representative to the Tampa district. In January, 1999, Defendants hired Defendant George Mykytiuk as the district sales manager of the Tampa unit where he acted as Plaintiff's direct supervisor. Plaintiff and her supervisor, Mykytiuk, worked in Defendants' business unit that markets Levaquin, a broad spectrum antibiotic, and Ultram, an analgesic remedy. These pharmaceuticals are distributed through a network of districts in which sales representatives call on physicians, pharmacists and hospitals to persuade them of the merits of prescribing and filling prescriptions with their drugs in appropriate medical circumstances.

Mykytiuk had previously worked as a pharmacist in New Jersey and then in various positions with Eli Lilly before joining Defendants. In addition to Plaintiff, nine or ten other sales representatives reported directly to Mykytiuk. At all times Mykytiuk directly supervised and made employment decisions affecting Plaintiff and the other sales representatives assigned to him. The sales representatives and district sales managers did not have an office location, instead working out of their home offices. Any meetings were generally held in places of public accommodation such as restaurants or hotel lobbies.

Mykytiuk was directly supervised by Cathy Wichert, who is located in Jacksonville, Florida. Wichert did not have any regular scheduled contact with Mykytiuk and communicated with him most often by e-mail. Wichert's direct supervisor was located in New

Jersey.

At the time he was hired, Mykytiuk did not have prior experience in supervising or managing employees. Defendants completed their "normal" background check (i.e., social security, motor vehicle and criminal records) on Mykytiuk and received a copy of his college transcript. Defendants did not contact Mykytiuk's then current employer (not contacting present employers appears to be standard practice for Defendants). (Wichert Dep. at 24-25, Ralph Dep. at 30-31, 109, Exh. 5). Mykytiuk was interviewed by Wichert, who also checked with two other employees who had previous work experience at Eli Lilly (at the time when Mykytiuk worked there) to confirm that Mykytiuk "was who he said he was on the interview from a position standpoint and that he was--just to validate his employment," but not to confirm that he was actually employed there at the time of the interview. (Wichert Dep. at 24).

Plaintiff's initial contact with Mykytiuk occurred in Spring 1999. In June and early July, 1999, Plaintiff claims that Mykytiuk first expressed a sexual interest in her, which included asking "inappropriate questions concerning her personal life, inappropriately taking her to a movie during working hours, kissing and fondling her, demanding that she meet him at his home, showing her a gun that he kept at his apartment, constantly telephoning her on her cell phone for non-business related matters and showing up at her home uninvited." (Dkt.# 50, ¶ 8). Plaintiff further claims that she was raped and forced to have sexual intercourse with Mykytiuk at his apartment (twice on one occasion) on June 29 and July 8, 1999. The record reveals that Mykytiuk claims that the sex was consensual. Significantly for purposes of the summary judgment motion, Defendants do not contest that Mykytiuk committed "unwelcome sexual advances" on Plaintiff prior to September, 1999.

It appears that Plaintiff attempted at some point, whether the sex was consensual or not, to discuss limiting contact with Mykytiuk to a "strictly professional relationship." It is undisputed that Plaintiff attended a joint therapy session with Mykytiuk and his therapist during which Plaintiff requested, and Mykytiuk agreed, to a "strictly professional relationship." Plaintiff alleges that Mykytiuk did not live up to the agreement as evidenced by several other incidents in

August, 1999, including sexual touching and comments, showing up at her house uninvited, offering to buy gifts for her, and other inappropriate conduct.

On September 3, 1999, being "driven crazy" with the "persistent and relentless sexual harassment" by Mykytiuk, Plaintiff telephoned Defendants' human resources department to complain about his conduct. Initially her call was anonymous, although the human resources representative who took her call advised Plaintiff that she had enough information from the telephone call to enable her to identify both the caller and the manager. She advised Plaintiff that she preferred to have Plaintiff make the decision to file the report on her own and asked Plaintiff to take the weekend to consider it. Plaintiff followed her advice and because it was a holiday weekend, called back on Tuesday, September 7, 1999, to again report the excessive attention and attempts by Mykytiuk to kiss and hug her.

The human resources representative assigned to Plaintiff's unit, Renee Ralph, immediately called Plaintiff and arranged to meet with her in Tampa on September 10, 1999. Ralph spent several hours interviewing Plaintiff who gave her extensive information including her own typewritten account of her complaints. At that time, Plaintiff did not report any incidents of sexual intercourse but expressed concern over her personal security, especially during the time period that Defendants planned to meet with Mykytiuk.

On September 15, 1999, Mykytiuk's supervisor summoned him to Tampa where she introduced him to Ralph who questioned him for several hours on Plaintiff's claims. [FN3] Of course, Mykytiuk described the relationship to be entirely consensual, including all occasions of sexual intercourse [FN4] and other personal details. Immediately following the interview, Mykytiuk was suspended and put on paid administrative leave. Defendants immediately began a full investigation of the matter.

FN3. Due to Plaintiff's fear for her personal security, Defendants paid for Plaintiff and her husband to be out of their Tampa home during the time of this meeting. (Walton Dep. at 608).

FN4. Mykytiuk claims there were several, four to six, incidents of sexual intercourse with Plaintiff. Plaintiff denies this claim and points out that for some of those alleged incidents, she was out of town or on the telephone.

At that time, Plaintiff had not told Defendants that Mykytiuk raped her. Several days later on September 17, Plaintiff first told her husband she was raped by Mykytiuk on two occasions, [FN5] and on September 20, Plaintiff filed a police report alleging rape. [FN6] Plaintiff then informed Defendants that Mykytiuk, in addition to the other reported harassment, also raped her. Plaintiff also obtained a temporary restraining order against him, but he was never served. Apparently, Mykytiuk relocated to Michigan during this time.

FN5. Plaintiff told her husband after learning that the notes of her therapy session with Mykytiuk were being requested in Mykytiuk's divorce case. The therapist's notes reveal, in part, that the sex was consensual--a claim that Plaintiff denies. She maintains that she did not report the rape because she was in fear of losing her job and due to the psychological stress from the alleged harassment. She maintains that the therapist's notes are incorrect and that she told the therapist that she had sex with Mykytiuk but "didn't want to." (Walton Dep. at 357).

FN6. In December 1999, the police declined to prosecute Mykytiuk for rape.

Defendants' investigation took until mid-December, 1999, to complete. During the investigation, Ralph and an investigator conducted numerous interviews, including additional interviews with Mykytiuk and Plaintiff. In December, Ralph and the investigator reported their findings to Defendants' management personnel in New Jersey--they were not able to rule out the possibility of a consensual

sexual relationship between Plaintiff and Mykytiuk. They also could not find that Mykytiuk committed rape. Nevertheless, the decision was made to discharge Mykytiuk due to his exercise of poor judgment in becoming involved with his subordinate employee and for not working on company time. (Mykytiuk Dep. at 234). Mykytiuk was terminated as of December 31, 1999. Notably, from the time of Plaintiff's first report of sexual harassment (September 3, 1999), she was kept completely separate and apart (with full pay) from Mykytiuk in the workplace. [FN7]

FN7. Plaintiff claims that Mykytiuk made "constant telephone calls" to Plaintiff (identified by her caller ID) after his suspension and termination. (Walton Dep. at 473-76). After his termination, Plaintiff obtained a restraining order against Mykytiuk, in part, based on cellular phone records she obtained showing these calls. (*Id.*)

On January 11, 2000, Defendants flew Plaintiff and her husband to the New Jersey office to report to them the results of the investigation. Plaintiff and her husband strongly disagreed with the results of the investigation, especially the implication that the sex was consensual. Plaintiff expressed her displeasure with the length of the investigation and the way Ralph and the investigator conducted the investigation. [FN8] Specifically, Plaintiff complains that Defendants did not believe her that she had been raped and that the investigation was faulty because certain individuals she identified and suggested be interviewed were not. Plaintiff had made some of these same complaints during the investigation. (Walton Dep. at 510).

FN8. After the meeting, Plaintiff and her husband demanded a meeting with higher management personnel at Johnson & Johnson. On January 12, 2000, Plaintiff and her husband met with a senior human resources executive with Johnson & Johnson.

After her call to the human resources department in September, Plaintiff claims that she was told by Ralph to "call in sick" to work. (Walton Dep. at 460). After reading the employee manual, Plaintiff believed that she could be terminated after five days sick time without a doctor's excuse. (Walton Dep. at 458, 483-84). After attempting to return to work for one day, Plaintiff was placed on paid administrative leave. Plaintiff also claims that she was told to apply for workers compensation [FN9] and short term disability. [FN10] (Walton Dep. at 484, 487). She was eventually approved for short-term disability in January, 2000 (retroactive to November 17, 1999, the day she first called the carrier). Her disability diagnosis was post-traumatic stress disorder as a result of the alleged sexual harassment.

> FN9. The workers compensation carrier informed Plaintiff that in Florida, claims for sexual harassment were not covered by workers compensation. Plaintiff contends that Defendants made her "go on a goat rope" by spending time calling worker's compensation when the claim was futile. (Walton Dep. at 487).

> FN10. It appears that Plaintiff was informed of the short term disability plan and benefits by Ralph who told her she could call the short term disability carrier to apply for benefits when she "felt like it." (Walton Dep. at 639). Plaintiff testified that she did not think it was appropriate for human resources to tell her about short term disability benefits, instead Defendants' "occupational health services" should have informed her. (Walton Dep. at 638). The Court finds this is a distinction without difference.

On May 12, 2000, Defendants sent Plaintiff a letter reminding her that she was close to exhausting her short-term disability benefits (which are available for a total of 26 weeks) and under the terms of the plan, would lose her active employment status if she did not return to work at the end of that time period. (Dkt. 53, Bobier Aff., ¶ 5). The letter reads, in pertinent part, as follows:

Because you have exhausted the full 26 weeks of STD on May 16 in accordance with the disability plan, effective May 17, you will no longer have reinstatement rights to the sales representative position. This means that if you are unable to return to work by May 16, 2000, you will no longer be considered an active employee. If that is the case, a company representative will contact you to arrange for a checkout date. The purpose of the checkout date is to collect all Ortho-McNeil property. You can expect to be contacted by Cathy Wichert. I have included excerpts from the STD-LTD plans.

It is my understanding that you have applied for Long Term Disability Benefits through Kemper National Services. We have been advised that your file is currently being reviewed for LTD benefit consideration and that an independent medical evaluation was scheduled for May 9, 2000, as part of this process. If approved by Kemper National Services, you will be eligible to receive LTD benefits under the J & J Choices Plan. You elected coverage at the 60% option and will be advised of the appropriate application process by Kemper. Should you be approved for LTD and later be medically cleared to return to the work force, you would have to reapply for employment since, as explained above, you have exhausted the 26 weeks maximum for STD and are no longer an active employee. A member of my staff or I will be happy to assist you in trying to locate available employment opportunities at that time.

Plaintiff did apply and qualify for long-term disability benefits, upon medical certification that she could not work, and was terminated from active employment status with Defendants effective May 17, 2000. [FN11] (Bobier Aff., ¶ ¶ 5-7). Plaintiff has since attempted to return to work for Defendants after receiving a medical "return to work" form signed by her physician dated February 5, 2002, which releases her to return to work as a sales representative. [FN12] Re-employment opportunities for Plaintiff are being explored by Defendants.

FN11. Plaintiff filed this lawsuit on September 15, 2000.

FN12. When questioned as to whether Plaintiff tried to return work at any time after September 1999, she testified "I wasn't capable to go back to work. [Q:] So you did not try to do that because you weren't physically or mentally able to, were you? [A:] Because I was raped. That's the evaluation of the doctors." (Walton Dep. at 707).

To support its assertion of the affirmative defense from *Ellerth* and *Faragher,* Defendants have provided a copy of the sexual harassment policy in effect which is included as part of Defendants' employee policy manual. (Dkt. # 53, Taylor Aff., Exh. 1). Defendants also annually mail a letter to employees concerning "harassment in the work place." (Dkt. # 53, Taylor Aff., Exh. 2). Defendants' policy prohibits harassment or discrimination (including a definition of sexual harassment) and details how complaints of harassment are handled and investigated.

Additionally, Mykytiuk participated in sexual harassment training provided by Defendants on September 1, 1999, approximately nine months after he was hired. Plaintiff testified that she never received a copy of the annual letter mailed to employees and never received any sexual harassment training during her employment with Defendants.

II. *LEGAL ANALYSIS*

A. *Summary Judgment Standard*

Federal Rule of Civil Procedure 56 requires summary judgment if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant can meet this initial burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of the case on which he or she bears the ultimate burden of proof. *Id.* The evidence must be viewed in the light most favorable to the non-moving party. *See Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Augusta Iron & Steel Works, Inc. v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir.1988).

Once the moving party has met his or her burden, Rule 56 requires the nonmoving party to go beyond the pleadings and by affidavit(s), or by the "depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in the nonmovant's favor. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers National Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir.1990). Employment discrimination cases should not be treated differently from other ultimate questions of fact that arise in other cases. *Chapman v. A.I. Transport*, 229 F.3d 1012, 1026 (11th Cir.2000).

B. *General Principles of Ellerth/Faragher Defense*

In *Ellerth* and *Faragher*, the Supreme Court considered an employer's vicarious liability for sexually harassing conduct by a supervisor--"[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with the immediate (or successively higher) authority over the employee." *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257; *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275. In analyzing the applicability of what this Court refers to as the "*Ellerth/ Faragher* defense," an employer's liability for a supervisor's harassment is separated into two cases: 1) harassment which culminates in a "tangible employment action" such as discharge, demotion or undesirable reassignment, and 2) harassment in which no adverse "tangible employment action" is taken but which is "sufficient to constructively alter an employee's working conditions." *Frederick v. Sprint/United Mgt. Co.*, 246 F.3d 1305, 1311 (11th Cir.2001), *citing Ellerth*, 524 U.S. at 761-63, 118 S.Ct. 2257; *Faragher*, 524 U.S. at 790, 807, 118 S.Ct. 2275. Under this framework, the Supreme

Court held that an employer is automatically vicariously liable or, strictly liable, for sexual harassment which results in an adverse "tangible employment action." *Id.* Conversely, when there is no adverse tangible employment action, an employer can avoid vicarious liability for the supervisor's conduct by raising and proving the two-prong affirmative defense described by the Court in *Ellerth* and *Faragher. Id.*

The two prongs or elements of the *Ellerth/Faragher* defense are: "1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior, and 2) the plaintiff-employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer, or to otherwise avoid harm." *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275; *Ellerth,* 524 U.S. at 765, 118 S.Ct. 2257. A defendant employer must satisfy *both* elements to avoid liability and bears the burden of proof on *both* elements. *Frederick,* 246 F.3d at 1312. *See Johnson v. West,* 218 F.3d 725, 731 (7th Cir.2000) (when court failed to make factual findings about the reasonableness of the plaintiff's failure to take advantage of preventative or corrective opportunities provided by defendant employer, the case was remanded for further proceedings).

As the Court explained in *Frederick,* an employer does not always have to show a formal sexual harassment policy to meet its burden of proof on the first element; however, an employer's establishment of a sexual harassment policy does not automatically satisfy its burden. As to the second part of the first element, an employer need not act instantaneously, but must act in a reasonably prompt manner to respond to an employee's complaint. *Frederick,* 246 F.3d at 1313-1314. Additionally, as to the second element of the defense, an employer showing that the plaintiff-employee failed to follow its complaint procedures will often be sufficient to satisfy its burden; however, in some cases the proof will show that the employee's non-compliance was "reasonable under the circumstances." *Id.*

C. *Application of the Ellerth/Faragher Defense*

(1) Tangible Employment Action

[1] The parties strongly dispute whether Plaintiff suffered a

"tangible employment action" which is a condition precedent for Defendants to be able to assert the *Ellerth/Faragher* defense. The Supreme Court provides the following guidance on this issue:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. The supervisor often must obtain the imprimatur of the enterprise and use internal processes. For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.
>
> *Ellerth,* 524 U.S. at 761-63, 118 S.Ct. 2257 (citations omitted).

Here, Plaintiff claims that she suffered a tangible employment action when she was terminated from her employment with Defendants on May 17, 2000. Defendants maintain that the termination of Plaintiff from active employment status was not a tangible employment action but instead an administrative processing of Plaintiff's seeking and obtaining long term disability benefits. Defendants argue further that even if the "termination" was considered a tangible employment action for these purposes, it was

not taken by her supervisor and therefore does not preclude the Defendants' availing themselves of the *Ellerth/Faragher* defense.

Although it is clear that a termination is a tangible employment action, a look at the facts behind Plaintiff's active employment status termination on May 17 reveals that it should not be considered a tangible employment action. As a result of her disability, Plaintiff was unable to work and therefore, qualified for and received short term disability benefits. Then, after her short term disability benefits expired, in order to avail herself of her long term disability benefits, her termination as an active employee was required. (*See* Dkt. # 73, Exh. 2, Exh. 1). The disability determination was not made by Defendants, but by Plaintiff when she applied for long term disability benefits and by a physician when she qualified for benefits after an independent medical examination. Furthermore, there is no causal connection between Defendant's action in terminating her as an active employee at the conclusion of her twenty-six weeks on short term disability leave and the sexual harassment committed by her supervisor. *See Frederick,* 246 F.3d at 1312. To consider this action a tangible employment action by Defendants does not fit within the scheme and goals of Title VII--it is not appropriate that an affirmative act by Plaintiff (of qualifying for and collecting disability benefits) and the resulting administrative circumstances should deprive the company of its affirmative defense.

Moreover, even if this action was considered a discharge by Defendants (which this Court does not find), it was not taken by Mykytiuk, her supervisor, and as such fails to constitute a tangible employment action for purposes of the applicability of, and the reasoning behind, the *Ellerth/Faragher* defense. *See Johnson v. West,* 218 F.3d 725, 731 (7th Cir.2000) ("[w]hen a supervisor takes a tangible employment action--in contrast to harassment that does not involve such a tangible action--there is assurance the injury could not have been inflicted absent the agency relation and thus the supervisor's action becomes for Title VII purposes the act of the employer"). That is, there was no "quid pro quo;" Mykytiuk did not use his "supervisory authority" to get Plaintiff fired or demand sex in return for a promotion. In fact, Mykytiuk was long suspended and terminated at the time Defendants administered the termination of her active employee status in May 2000.

To the extent that Plaintiff argues that her discharge was a constructive discharge, an argument which she could make by virtue of the fact that the alleged harassment led to her disability, the Court does not agree. [FN13] Accordingly, because Plaintiff suffered no tangible employment action by Defendants, they are permitted to go forward with establishing the elements of the affirmative defense.

> FN13. In her opposing memorandum, Plaintiff maintains that this issue is "not present in this case," yet maintains that the disability and termination were a "direct result of her supervisor's sexual harassment." Courts are split as to whether constructive discharge constitutes a tangible employment action. *See e.g. Desmarteau v. City of Wichita,* 64 F.Supp.2d 1067, 1078-79, n. 4 (D.Kan.1999). Defendants attach the court's opinion in *Rabassa v. Evelyn,* Case No. 97-2105-CIV-GRAHAM, (S.D.Fla.1999) (Dkt.# 73, Exh. 3) which has been affirmed by the Eleventh Circuit. There, Judge Graham reasoned that constructive discharge does not carry with it the necessary "imprimatur" of the enterprise to be considered a tangible employment action.

(2) Elements of the Ellerth/Faragher Defense

[2] The first element of the *Ellerth/Faragher* defense, that the employer exercised reasonable care to prevent and promptly correct harassing behavior, involves two parts: the prevention and the prompt correction of harassing behavior. In applying the facts of this case to this element, it appears that Defendants have established the first part of the first element by the presentation of (1) a sexual harassment policy contained in its policy manual (Dkt. # 53, Taylor Aff., Exh. 1) and (2) a letter regarding sexual harassment in the work place sent annually to all employees (*Id.,* Exh. 2). Defendants' policy specifically prohibits harassment or discrimination (with a definition of sexual harassment) and details how complaints of harassment are handled and investigated.

There is also evidence in the record that Plaintiff's supervisor, and

other district managers, attended sexual harassment training. Although Plaintiff testifies that she did not receive the letter sent to employees and that her supervisor did not attend training until after the alleged sexual harassment, these items are not sufficient to overcome Defendants' evidence on the prevention part of the first element of the *Ellerth/Faragher* defense. [FN14]

> FN14. Plaintiff further contends that Defendants' harassment policy is inadequate because in cases like hers where it is not appropriate to report the harassment to the employee's supervisor, the employee is directed to request a "confidential discussion with the appropriate Organizational Effectiveness representative" and that Defendants have not adequately identified that person. Nevertheless, Defendants submitted a copy of an annual letter to employees regarding harassment in the work place that adequately identifies that "[i]n instances where a supervisor may be involved in the incident, misconduct should be reported to a higher level of management or to a Human Resources Representative" and continues to assure employees that there is "an employee complaint procedure for investigating and resolving such complaints." Moreover, when Plaintiff decided to complain, she does not contend, nor are there any facts in the record to support the contention, that she had any difficulty in finding the person or office to complain to when she telephoned the human resources department in Defendants' New Jersey office. As such, the Court does not find these alleged inadequacies in the policy are material issues of fact which would preclude summary judgment in favor of Defendants on the *Ellerth/Faragher* defense.

[3] The second part of the first element--whether Defendants took reasonable care to correct any sexually harassing behavior--requires the Court to inquire into whether Defendants acted promptly on Plaintiff's complaint when given notice of her allegations through the methods set forth in Defendants' policy. Defendants contend that they acted reasonably and promptly in correcting and preventing any further sexually harassing behavior by immediately suspending

Mykytiuk and insuring that Plaintiff had no further work contact with him (which continued throughout the investigation). Plaintiff, although she was out on disability leave, does not contend that she ever had to work with Mykytiuk again.

The facts reveal that Plaintiff first informed Defendants of some portions of the alleged sexual harassment on Friday, September 3, 1999, and again on Tuesday, September 7, 1999 (Monday, September 6 was the Labor Day holiday). [FN15] A representative of Defendants' human resources department immediately followed up with Plaintiff and arranged a meeting in Tampa on September 10, 1999. The investigators then met with Mykytiuk on September 15, and immediately thereafter suspended him. It is undisputed that Plaintiff never worked with him again. Defendants did all they could to insure from that point forward, that in her workplace, Plaintiff no longer had to endure harassing behavior from her supervisor.

> FN15. Although Defendants do not address Plaintiff's contention that two senior members of Johnson & Johnson were informed of the allegations of harassment through a conversation with a friend of Plaintiff's, Kim Van Goidtsnoven, who was employed as a sales representative with another subsidiary of Johnson & Johnson, the Court does not find this argument availing because she is not the person identified in the company's harassment policies. *See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir.2000) (employer was on notice of alleged sexual harassment when employee contacted persons identified in employer's sexual harassment policy, not when they complained informally to various mid-level managers). Moreover, even if these conversations constituted notice of the harassment, the issue of whether Defendants acted with reasonable promptness remains. Plaintiff's conversation with Van Goidtsnoven didn't occur until August. (Van Goidtsnoven Dep. at 26, 28) ("within August in about a two-week time frame ... probably close to the end of August"); (Walton Dep. at 447-48) ("... it was sometime like mid-August"). And both of the senior management personnel

told Van Goidtsnoven (who in turn told Plaintiff) that she should go to human resources to report Mykytiuk's conduct. In light of the circumstances, the Court finds that Defendants were acting with "reasonable care" to correct the sexually harassing behavior when they responded to Plaintiff's complaint in early September.

Plaintiff's contention that Defendants should have known of the harassment by virtue of another sales representative's observations that Mykytiuk was acting "strange and weird" and expressing an interest in female customers is meritless. First, this observation was made during the investigation, after Plaintiff reported the harassment and cannot therefore serve as notice to Defendants. Also, such information, even if timely, is patently insufficient to put Defendants on notice of the pervasive or severe harassment Plaintiff alleges she suffered.

Plaintiff further contends that Defendants did not act with "reasonable promptness" because their investigation took too long (approximately three months) and that Mykytiuk was not immediately fired upon her initial telephone complaint. In essence, Plaintiff is dissatisfied with both the process and the results of the investigation. She also believes that Defendants should have disciplined Mykytiuk differently. None of Plaintiff's subjective opinions or perceptions, even if taken as true, create issues of material fact sufficient to overcome Defendants' proof on this element. The Court finds that Defendants have carried their burden on the first element of the *Ellerth/Faragher* defense.

[4] Defendants must also sustain their burden of proof on the second element of the defense--that the plaintiff-employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer, or to otherwise avoid harm. It is undisputed that Plaintiff took advantage of the company's protective/corrective opportunities when she made her initial telephone complaint to human resources about Mykytiuk's harassing conduct. The question remains whether this conduct was reasonable.

Defendants maintain that Plaintiff *unreasonably* failed to take advantage of this opportunity because she failed to *promptly* complain, claiming that she waited nearly three months after the first act of alleged harassment to call Defendants' human resources department. Plaintiff argues that her complaint was made five days after the last act of harassment by Mykytiuk and any delay in her complaining was reasonable because she did so out of fear that she would lose her job. [FN16]

> FN16. Plaintiff testified that Mykytiuk knew the company's vice- president and told her how "well connected" he was in the company and that if she "stayed close to him," he could help promote her to hospital sales representative. (Walton Dep. at 313, 528). Plaintiff also knew that Mykytiuk was hired laterally from another pharmaceutical company, which she claims is not a common practice for Defendants.

Defendants' policy is in place in an attempt to protect employees from suffering from sexual harassment or continued sexual harassment. The three month delay by Plaintiff in reporting the first alleged act of harassment (and thus allowing it to continue) initially weighs against her on this element.

In defense of her claim, Plaintiff contends that this delay should be excused due to her fear of losing her job. Although some courts have taken a lenient view in determining what is reasonable in cases involving the victim's fear of losing her job in retaliation for complaining, the Court does not view this as that type of case, nor does the record support a finding that her fear was reasonable. *See Johnson,* 218 F.3d at 731; *see also Maple v. Publications Internat'l, Ltd.,* 2000 WL 1029112 (N.D.Ill.2000). Unlike the facts of *Johnson,* Plaintiff was not threatened that if she took any action against Mykytiuk, it would come "at the price of her job," nor was she a probationary employee. To the contrary, she was a nine year employee and Mykytiuk was a more recent hire (approximately ten months).

Moreover, the only evidence in the record is that Plaintiff feared not

getting a promotion from Mykytiuk (because of his alleged influence with persons in Defendants' higher management). Although Plaintiff calls this "intimidation," there is no evidence, other than Plaintiff's subjective opinion or perception, that Mykytiuk threatened her with losing her job. Plaintiff has failed to articulate a specific factual basis for being in fear of losing her job. *See* Walton Dep. at 390-91, 415-16, 544. Plaintiff has not provided sufficient evidence from which this Court could find that her fear was reasonable so as to excuse her from taking advantage of the preventive and corrective opportunities provided by Defendants in a reasonably prompt manner, or otherwise failing to avoid harm. [FN17]

> FN17. In addition, as Defendants point out, there is evidence in the record that during the time that Plaintiff failed to notify Defendants of the harassment, she also failed to "otherwise avoid harm" by placing herself in situations that permitted further harassment by Mykytiuk (for example, going back to his apartment or hotel room with him or accepting a key and the security access code for his apartment). *See* Walton Dep. at 240, Exh. 5; Mykytiuk Dep. at 436. Plaintiff's alleged fear of losing her job also fails to excuse this behavior for the same reasons set forth above.

In addition to the fear of losing her job in retaliation for complaining, Plaintiff also argues that her ability to complain was impaired by the emotional and psychological stress she suffered as a result of the harassment and that she should be excused from promptly reporting the harassment for this reason. The record certainly establishes that she suffered from a disabling psychological condition (e.g., she was diagnosed with post-traumatic stress disorder). The Court, however, declines to use this later diagnosis to obviate her need to act promptly to report the harassment or to otherwise avoid further harm at the time of the harassment.

Viewing the facts in the light most favorable to the Plaintiff, the Court finds that Defendants have carried their burden on the second element of the *Ellerth/Faragher* defense. Accordingly, summary judgment in Defendants' favor is warranted on Plaintiff's sexual

harassment claim because Defendants have properly raised and sufficiently established all elements of the *Ellerth/Faragher* defense, which disposes of Plaintiff's claim.

C. *Retaliation Claim*

In order to state a claim for retaliation, a plaintiff must establish each element of a *prima facie* case. To do so, Plaintiff must show that: 1) she engaged in statutorily protected expression, 2) she suffered an adverse employment action, and 3) that there is some causal connection between the two events. *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir.1998).

[5][6] Plaintiff claims that she engaged in a number of protected activities in order to establish the first element of a *prima facie* case of retaliation. The Court finds that Plaintiff established that she engaged in a protected activity when she filed a complaint with Defendants' human resources department in September, 1999. The other activities listed by Plaintiff (Dkt. # 67 at 17), which include her telling Mykytiuk that his "sexual demands were unwelcome" and going to his therapist with him to "engage in an agreement that they would only have a professional relationship" are not activities for which Defendants may be held vicariously liable. *Interalia,* Mykytiuk, as Plaintiff's direct supervisor, is not the appropriate person identified by Defendants' policies to whom to report harassment when he is the alleged harasser, nor is Mykytiuk's independent therapist. *See Madray,* 208 F.3d at 1299-1301. Additionally, reporting the harassment to her friend at another Johnson & Johnson subsidiary, who reported it to her supervisors, is also not a protected activity, for the reasons discussed *supra, n. 15.*

[7] As to the second element, Plaintiff claims that she "suffered a series of retaliatory actions, culminating in her termination." (Dkt. # 67 at 18). The only activities, other than termination, that she lists is that she was "told to stay home and take 'sick time' " and then told to apply for workers compensation (which as it turns out does not include claims for sexual harassment). The Court finds that Plaintiff fails to establish the second element of her prima facie case because the conduct alleged as a "series of retaliatory actions" fails to qualify as adverse employment actions. As Defendants correctly state, the

alleged conduct must meet some threshold of substantiality. *See Gupta v. Florida Board of Regents,* 212 F.3d 571, 587 (11th Cir.2000), *cert. denied,* 531 U.S. 1076, 121 S.Ct. 772, 148 L.Ed.2d 671 (2001); *see also Doe v. Dekalb County School District,* 145 F.3d 1441, 1449 (11th Cir.1998) ("not everything that makes an employee unhappy is an actionable adverse action"). These actions do not.

[8] Plaintiff's claim that her termination constitutes an adverse employment action is also misplaced. As this Court has previously explained, her termination is not an adverse employment action by Defendants, instead it was a removal of Plaintiff's name from active employment status as a result of her applying for disability leave and receiving a diagnosis from a physician that she was suffering from post-traumatic stress disorder and was disabled for purposes of qualifying for short-term, and later long-term, disability benefits.

Plaintiff alleges that *these disability benefits* "deprived her of her full salary benefits, car and job advancement." Plaintiff provides no factual support for this allegation. Plaintiff's allegation that the disability benefits, not Defendants, deprived her of these items is not sufficient to establish an adverse employment action or causal connection between her complaint of harassment and the active employment status termination. As such, her termination does not constitute an adverse employment action for purposes of making out a claim for retaliation. Accordingly, because Plaintiff has failed to establish a *prima facie* case of retaliation, Defendants are also entitled to summary judgment on this claim.

D. *Plaintiff's State Law Claims.*

In addition to Plaintiff's Title VII and FCHR claims, she also asserts claims against Defendants for intentional infliction of emotional distress and negligent hiring, retention and supervision. At the time the Plaintiff filed her Complaint, her Title VII claims (sexual harassment and retaliation) presented a federal question within the original jurisdiction of this Court. At that time the Court exercised supplemental jurisdiction over the state law claims. The Court has now granted summary judgment in favor of Defendants on Plaintiff's federal question claims. Therefore, it is within the Court's

discretion whether it will continue to exercise jurisdiction over the remaining pending state law claims. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Rice v. Branigar Org., Inc.,* 922 F.2d 788 (11th Cir.1991). The Court continues to exercise its supplemental jurisdiction over Plaintiff's state law claims and finds final summary judgment in favor of Defendants is also warranted on these claims.

Negligent Retention

[9] In Count IV of her complaint, Plaintiff claims that Defendants should be liable for the negligent hiring, retention and supervision of Mykytiuk. In her complaint, Plaintiff alleges that Defendants had a "duty of conducting an investigation into the background of supervisors and further had a duty of supervising the employment decisions affecting persons in positions such as that occupied by Plaintiff" and that "prior to hiring Mykytiuk, the corporate Defendants knew or should have known of his unfitness to supervise female employees, and upon information and belief, problems that he had at his previous employment. During the course of Plaintiff's employment, corporate Defendants became aware of the problems of Mykytiuk that indicated his unfitness, but corporate Defendants failed to timely take appropriate action, thus resulting in Plaintiff's physical impact of the intentional infliction of emotional distress." (Complaint, ¶ ¶ 59, 64).

[10] On this claim, the Court finds that there is inadequate factual support in the record. Quite simply, when an employer fails to take any corrective action against an employee because the employer has no notice of problems with the employee's fitness, that employer is not liable under Florida law for negligent supervision or retention.

Also, as discussed *supra,* the Court does not find that Defendants failed to "timely take appropriate action" because Defendants did not become aware of any problems with Mykytiuk that would indicate "his unfitness" until September, 1999, when they immediately suspended him. There is no evidence that he was not being supervised. That leaves as the sole allegation supporting Count IV of the Complaint that Defendants failed to conduct an appropriate background investigation into Mykytiuk and "knew or should have

known of his unfitness to supervise female employees."

Plaintiff makes much of the fact that Defendants did not contact Mykytiuk's current supervisor prior to hiring him. This appears to be a common hiring practice when an employee is searching, confidentially, to change jobs. Plaintiff's claim would seem to support the untenable position that individuals cannot conduct, and employers comply with requests for, confidential job searches. Moreover, the record contains evidence that Wichert did check with other employees of Defendants whom she knew had worked at Mykytiuk's former employer at the time he worked there. Defendants also engaged in a standard and preliminary background investigation of Mykytiuk before hiring him. [FN18]

> FN18. The record also supports Plaintiff's contention that Mykytiuk was not hired through the "standard" or more common practice of "coming up" through the company. The Court does not find this contention sufficient to support a claim for negligent hiring, either standing alone or in combination with Plaintiff's other contentions.

Plaintiff further alleges that Defendants did not properly investigate Mykytiuk because they did not adjudge his ability to supervise employees. Even if Defendants did not evaluate Mykytiuk's supervisory abilities or require that he have supervisory experience, that would not be sufficient to support a claim for negligent hiring. If so, a company could never hire a supervisor without supervisory experience and hiring supervisors would eventually become impossible. Nor is the Court willing to make the leap that a potential employee's failure to have supervisory experience would put a defendant employer on notice that the potential employee would sexually harass a female employee whom he then supervised. *See Garcia v. Duffy*, 492 So.2d 435, 441 (Fla. 2d DCA 1986) (the "standard of care" for a company is one which a "reasonably prudent man" would exercise in choosing or retaining an employee for the "particular duties to be performed"). On this record, the Court finds that summary judgment in favor of Defendants is appropriate on Plaintiff's claims of negligent hiring, retention and supervision.

[FN19]

FN19. Plaintiff points to a complaint of sexual harassment that has been filed against Mykytiuk at a *subsequent* employer. (Dkt. # 67 at 20). Such a complaint is irrelevant to this action and should be stricken.

Intentional Infliction of Emotional Distress

[11][12] Under Florida law, a claim for intentional infliction of emotional distress is established by conduct alleged to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277, 278 (Fla.1985). Plaintiff claims that there is "no doubt" that rape should be considered such conduct and asserts that Defendants may be held vicariously liable for this rape where it "arises from the acts of its agents."

Defendants contend that they are not vicariously liable for Mykytiuk's actions and cite to Florida law holding that claims for sexual harassment are not covered by workers compensation as support for this contention. *See e.g., Byrd v. Richardson-Greenshields,* 552 So.2d 1099 (Fla.1989); *Schwartz v. Zippy Mart, Inc.,* 470 So.2d 720, 724 (Fla. 1st DCA 1985), *overruled on other grounds by Byrd.* From this area of law, Defendants conclude that they are not liable for Mykytiuk's intentional and violent acts because they did not place Mykytiuk in a situation with Plaintiff where his raping her was a "virtual certainty." (Dkt. # 53 at 19). The Court declines to apply this standard to this conduct; however, it does find that Plaintiff has failed to establish, on this record, that Defendants should be held vicariously liable for Mykytiuk's conduct for the reasons set forth *supra* and because there is no evidence that Mykytiuk's harassing conduct was in furtherance of the business interests of Defendants. *See Ayers v. Wal-Mart Stores, Inc.,* 941 F.Supp. 1163, 1169 (M.D.Fla.1996) (no claim for intentional infliction of emotional distress when assault is "purely personal to servant, having no real connection with master's business").

Furthermore, without vicarious liability, the only actions taken by Defendants are their response to and investigation of Plaintiff's complaints of sexual harassment. Defendants' conduct in the investigation, even taken in the light most favorable to Plaintiff, is certainly not the type of conduct that meets the high standard set forth in *Metropolitan Life* to constitute intentional infliction of emotional distress. Accordingly, the Court finds that summary judgment in Defendants' favor is warranted on Plaintiff's claims of intentional infliction of emotional distress.

III. *CONCLUSION*

Accordingly, for the reasons set forth herein, Defendants' Motion for Case Dispositive Summary Judgment (Dkt.# 52) is hereby **GRANTED** and Plaintiff's Motion for Partial Summary Judgment (Dkt.# 50) is **DENIED.** The Clerk is directed to enter final summary judgment in favor of Defendants on Plaintiff's federal claims of sexual harassment and retaliation and her other state law claims. The Clerk is also directed to terminate all pending motions and close this case.

203 F.Supp.2d 1312, 89 Fair Empl.Prac.Cas. (BNA) 55

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(2)

No. 03-1056

IN THE

Supreme Court of the United States

LUANNE WALTON,

Petitioner,

v.

JOHNSON & JOHNSON SERVICES, INC., and ORTHO-MCNEIL PHARMACEUTICAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TERENCE G. CONNOR
LISA R. ASKOWITZ
MORGAN, LEWIS & BOCKIUS LLP
200 South Biscayne Boulevard
Miami, FL 33131-2339
(305) 415-3000

HARRY RISSETTO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
(202) 739-3000

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether an employer is entitled to the affirmative defense established in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) when the plaintiff's failure to report promptly leads to greater harm?

CORPORATE DISCLOSURE STATEMENT

Respondent Ortho-McNeil Pharmaceutical, Inc. and Johnson & Johnson Services, Inc. are not publicly held companies, and their ultimate parent corporation, Johnson & Johnson, is a publicly held company. However, no publicly held entity owns more than 10% of the stock of Johnson & Johnson.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Introduction	2
B. Ortho Responded Promptly and Effectively to Walton's Complaint	4
1. September 3, 1999, Anonymous Complaint to Ortho's Human Resources Department	4
2. Immediate Response	5
3. Ortho's Repeated Attempts to Return Walton to Work	6
4. Walton's Initial Complaint Was Based Only on Mykytiuk's Alleged Excessive Attention and Attempts to Kiss Her	8
5. Investigation of "Rape" Begins'	10
C. The Proceedings Below	13
REASONS FOR DENYING THE WRIT	14
I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE STANDARDS FOR EMPLOYER LIABILITY ALREADY DECIDED IN *ELLERTH* AND *FARAGHER*	14
II. THE PETITION DOES NOT AND CANNOT SHOW ANY CONFLICT AMONG THE COURTS OF APPEAL	17
CONCLUSION	18

TABLE OF CITED AUTHORITIES

CASES — Page

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) ..... *passim*

Casiano v. AT&T Corp., 213 F.3d 278 (5th Cir. 2000) 17

Desmarteau v. City of Wichita, 64 F.Supp. 2d 1067 (D. Kan. 1999) 17

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ..... *passim*

Johnson v. West, 218 F.3d 725 (7th Cir. 2000) 17

Suders v. Easton, 325 F.3d 432 (3d Cir.), *cert. granted*, 124 S. Ct. 803 (2003) 3

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 15

Walton v. Johnson & Johnson Services, Inc., 347 F.3d 1272 (11th Cir. 2003) 14, 15, 16

STATUTE

42 U.S.C. § 2000e, *et seq.* 1-2

IN THE

Supreme Court of the United States

No.03-1056

LUANNE WALTON,

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JOHNSON & JOHNSON SERVICES, INC.,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition seeks review of a decision of the Eleventh Circuit Court of Appeals, affirming summary judgment for Respondent Ortho-McNeil Pharmaceutical, Inc. ("Ortho"), on petitioner Luanne Walton's ("Walton") claim that she had been subjected to sexual harassment in violation of Title VII

of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ("Title VII").[1] The petition should be denied.

A. Introduction

Petitioner, Walton, who was a sales representative for Ortho from 1989 through 1999, alleges that she was sexually harassed by her supervisor, George Mykytiuk.[2]

The Court of Appeals held that the district court correctly had found that the *Ellerth/Faragher* affirmative defense was available to Ortho and correctly had applied it to find no liability on the part of Ortho. To understand why the Court of Appeals' decision involved the typical application of the principles announced in *Ellerth* and *Faragher* and requires no further review, it is important to first review the critical uncontested facts. Immediately after Walton complained to Ortho's human resources department on September 7, 1999, that Mykytiuk had tried to hug and kiss her, Ortho did precisely what this Court has said an employer should do: it responded promptly and acted effectively to prevent any future harassment. It ensured that Walton never had to work with Mykytiuk again. After Mykytiuk was interviewed as part of the investigation of Walton's complaint on September 13, 1999, he was suspended from all duties, and he moved to Michigan, thus guaranteeing her a safe and secure workplace. Her later decision in May of 2000 to elect long-term disability benefits over returning to work was not a

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[1] Walton also brought a claim for retaliation under Title VII; claims for sexual harassment and retaliation under the Florida Civil Rights Act; and claims for intentional infliction of emotional distress and negligent hiring, supervision, and retention under Florida common law. None of these claims are at issue in the petition.

[2] Mykytiuk was a defendant below, but was dismissed, pursuant to a settlement agreement with Walton. Johnson & Johnson Services, Inc., is a "sister" subsidiary corporation to Ortho. Walton presented no record evidence that she ever was employed by Johnson & Johnson.

"tangible employment action" culminating from an act of sexual harassment. Therefore, it was not sufficient to deprive Ortho of the affirmative defense to liability for its having acted promptly.

At the outset, it is important to note that Walton consistently and emphatically has argued that "constructive discharge" is *not* at issue in her case. Nevertheless, Walton attempts to "piggy-back" her case onto what she admits is the "analytically distinct" question of whether "constructive discharge" constitutes a tangible employment action—the question that will be answered by the Court in its review of *Suders v. Easton*, 325 F.3d 432 (3d Cir.), *cert. granted*, 124 S. Ct. 803 (2003). In her petition, Walton herself highlights the stark contrast of the facts of *Suders* to the undisputed fact in this case that, when Walton opted not to return to work in May of 2000, Mykytiuk had been out of the workplace for eight months. Therefore, she could not base her case on the theory that her workplace was intolerable. It was the workplace in which she had prospered for ten years prior to Mykytiuk's employment, and one from which he was long gone.

Indeed, the appropriateness of certiorari review in *Suders* provides a significant contrast to the instant case. The issue of constructive discharge raised in *Suders* is a recurring matter of deep division in the federal courts. The issue presented by Walton in the unusual factual circumstances and legal posture of her case is not. Accordingly, this case does not warrant review on its own merits and should not be consolidated with *Suders* or held for possible remand in light of the *Suders* decision.

B. Ortho Responded Promptly and Effectively to Walton's Complaint

1. *September 3, 1999, Anonymous Complaint to Ortho's Human Resources Department*

On September 3, 1999, Walton invoked Ortho's anti-harassment policy that was published in her copy of the Ortho Employee Handbook, by anonymously calling Ortho's Human Resources Department.[3] She had a copy of that handbook at her home in Tampa, Florida. Walton told human resources representative Angela Taylor, who answered the call, only that she had an over-attentive district manager who had tried to kiss and hug her on one or two occasions. Walton declined to identify herself or her supervisor. Taylor invited Walton to make a formal complaint, but Walton declined to do so on that call, saying that she knew her district manager would be "toast" if she did. Taylor asked Walton to take the weekend to consider the matter and make a formal complaint, but she advised Walton that, even if she would not do so, Taylor had learned enough from their conversation to identify the parties and initiate an investigation, and she would do so.

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[3] Ortho's anti-harassment policy unequivocally prohibits sexual harassment; describes the types of behavior prohibited; provides that complaints of harassment should be made to the employee's supervisor, manager, or an Organizational Effectiveness Representative in Human Resources; explains that complaints will be handled and investigated by Human Resources; provides that violators will be disciplined; and ensures no retaliation against a complaining employee. Ortho publishes this policy as part of its employee manual (which is distributed to all employees), reminds employees of the policy annually through a letter from Ortho's president, offers employees a human resources hotline to report complaints, and trains its managers in sexual harassment prevention. Walton repeatedly, on pages 12, 13 and 14 of her petition, excuses her own failure to invoke this policy earlier by pretending that her supervisor's kissing her and grabbing her breasts and buttocks was not "actionable" behavior or "a violation of Title VII." This employer's policy is unequivocally neither that restrictive, nor that naïve.

On Monday, September 7, 1999, Walton called Taylor and identified Mykytiuk as the offending district manager. She made no further allegations than the hug and kiss attempts that had occurred three months earlier, did not tell Taylor of that delay, and did not mention the grabbing of her breasts or buttocks. Taylor told Walton that she would turn the matter over to Renee Ralph, the human resources manager assigned to Walton's organization (who was on vacation through the Labor Day holiday weekend).

2. *Immediate Response*

Taylor called Ralph immediately after Walton's call, and Ralph called Walton the same day to set up an appoint ment for an interview in person. Three days later, on September 10, 1999, Ralph traveled to Tampa, Florida, and spent several hours interviewing Walton. Walton also gave Ralph a typewritten account of her complaints. Again, she reported only that Mykytiuk had paid excessive attention to her and tried to hug and kiss her on a couple of occasions.[4]

On September 13, 1999, when Ralph questioned Mykytiuk at length, he gave Ralph a completely different view of his relationship with Walton, claiming that he and Walton had had an intense and entirely consensual love affair that included repeated acts of sexual intercourse, sometimes at Walton's initiation. At the end of the interview, Mykytiuk was suspended from duty.

Mykytiuk never returned to work for Ortho. He moved from Tampa back to Michigan in October 1999 after he had

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[4] As will be developed later in this Statement of the Case, Ortho's investigation took on a different character when Walton claimed two weeks later, after learning that details of a sexual relationship between her and Mykytiuk would be become public record in Mykytiuk's divorce proceeding, that Mykytiuk actually had raped her on two occasions in late June and early July.

been suspended, and he was later formally discharged by Ortho.

3. *Ortho's Repeated Attempts to Return Walton to Work*

During the entire time period that she allegedly was being harassed by Mykytiuk, and up until her complaint to Human Resources on September 7, 1999, Walton had worked in the same position with the same pay and benefits. Walton admits that, during the time period of the alleged harassment, Mykytiuk never threatened her job. Ortho eliminated any possibility that Mykytiuk's harassment could culminate in a tangible employment action by promptly suspending him in connection with Walton's initial complaint.

Shortly after Walton made her complaint to human resources, however, she went on leave and began collecting short-term disability benefits under Ortho's disability plan. By November 1999, Ralph had repeatedly invited Walton to return to work with complete assurance that she would not be exposed to Mykytiuk. Walton refused, claiming by that time that, because of her psychic injury, she was unable to work.[5]

In January 2000, Ralph invited Walton and her husband to New Jersey for a briefing on the close of their investigation. Ralph and Alan Saleeba, Johnson & Johnson's Director of Security, informed the Waltons that they could not conclude from their investigation that Walton had been a victim of rape, and that they were unable to exclude the possibility that Walton and Mykytiuk had simply had a consensual love affair that ended. The Waltons were furious and demanded to see the Chairman of Ortho's parent company, Johnson & Johnson. Instead, they met with the chief human resources officer for Johnson & Johnson, Michael Carey.

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[5] Actually Walton's treating psychiatrist at the time recommended she return to work, but Walton disagreed.

Carey assured the Waltons of his confidence in the integrity of the investigation, but offered Walton any assistance he could provide to ease her return to work, including the possibility of placement with another Johnson & Johnson company and in another geographic location, if she so desired. (Her husband was an Air Force officer, subject to transfer.) Walton never responded to Carey's offer, or to his follow-up offer a week later.

Walton never again returned to work at Ortho, although she took advantage of serial disability programs provided by Ortho as a benefit of her employment. In May of 2000—ten months after the alleged rapes, and eight months after Walton had complained and Mykytiuk had left the workplace, Ortho informed Walton that, as of May 16, 2000, she would exhaust the 26-week short-term disability benefit under Ortho's plan. The letter gave Walton the opportunity to return to work or to have her active employment status terminated so that she could apply for long-term disability benefits under Ortho's disability plan. It also invited her to seek reemployment with assistance when she was able. Walton elected long-term disability benefits over returning to work. Based on her then current doctors' reports, she was approved. She obtained these benefits continuously until February 2002, when her doctor said she was no longer disabled.

These undisputed facts of Ortho's prompt and effective remediation of Walton's harassment complaint describe a textbook case for application of the *Ellerth/Faragher* affirmative defense. Walton nevertheless argues, as she did for the first time in the Court of Appeals by way of reply brief, that the alleged rapes themselves should be considered "tangible employment actions" such that Ortho would not have been entitled to the affirmative defense because no reasonable person would have reported the harassing acts prior to the rape. To understand why the Court of Appeals found her argument to be baseless, it is important to review

the following additional facts, in the sequence as they occurred from April 1999 through December 1999, and as they unfolded from Ortho's investigation of Walton's complaint.

4. *Walton's Initial Complaint Was Based Only on Mykytiuk's Alleged Excessive Attention and Attempts to Kiss Her*

Walton's first contact with Mykytiuk as her new supervisor was in early 1999. By April 1999, they had had some supervisory contact when Mykytiuk "rode with" Walton to observe her sales calls on physician customers in her territory. According to Walton's account, the first significant incident between them was on June 14, 1999, when Mykytiuk accompanied Walton on another "ride-with" to call on physicians. According to her report, they then went to a movie and had dinner together. On that occasion, Mykytiuk began to tell Walton of his personal problems, including an impending divorce from his wife in Michigan. Walton drove Mykytiuk back to his car to let him off. When they arrived, he tried to kiss her. She reports that she told him his behavior was inappropriate. He apologized and promised never to do it again.

On the next day, June 15, 1999, Walton and Mykytiuk met at a Starbucks. Walton then drove Mykytiuk to her house for an inventory of her physician samples, which she kept in her garage. Later, they made office visits, and then Walton drove Mykytiuk to his apartment because he said he wanted to "redo the inventory." After completing the inventory, Mykytiuk again discussed with Walton his disappointment over his impending divorce. As Walton was leaving Mykytiuk's apartment, he told her he was sad and that he needed a hug. As he had the day before, Mykytiuk again tried to kiss Walton. This time, he also grabbed her breasts and buttocks. Walton pushed Mykytiuk away and told him "No,"

and again Mykytiuk apologized. Walton then drove Mykytiuk back to Starbucks to get his car.[6]

It is only some of Mykytiuk's alleged conduct on June 14-15, 1999, that Walton first described for Angela Taylor and Renee Ralph in her telephone calls to them on September 3 and 7, 1999, in her interview with Ralph on September 10, 1999, and in the typed statement she gave Ralph on September 10th. But that conduct is precisely the kind of conduct Ortho's policy prohibits in the employee manual Walton kept at her home. The manual neither requires the employee to evaluate the conduct as "actionable" nor as sufficient to "violate Title VII," and it is clear that both parties acknowledged the conduct as both inappropriate and sexual.

This reported conduct by Mykytiuk, and his account of a voluntary sexual relationship with Walton, led to his suspension on September 13, 1999. But the investigative course changed dramatically because of events occurring on September 17, 1999. On that date, Dr. Kathleen Cervenka, Mykytiuk's and Walton's psychologist, called Walton to inform her that Mykytiuk's wife had subpoenaed Dr. Cervenka's treatment records, which would reveal that Mykytiuk and Walton had had an immature and irresponsible, but entirely consensual, love affair involving repeated sexual

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[6]A couple of days later, Walton, at Mykytiuk's request, went to Mykytiuk's apartment and accepted a key and security code to his apartment. Mykytiuk told her that he needed her to have access to his home office in case he was out of town and needed something faxed to him.

intercourse.[7] Upon receiving this news, Walton told her husband, for the first time, that she had been raped by Mykytiuk. She then called Mykytiuk's wife, Shelly Skinner, in Michigan, and began a collaboration with her in which they would trade information about Mykytiuk to aid each other in Skinner's custody battle and Walton's complaint against Mykytiuk and Ortho.

5. *Investigation of "Rape" Begins*

Three days later, on September 20, 1999, Walton called Mykytiuk's superior, regional manager Cathy Wichert, to inform her, and ultimately Ralph, that she had left out from her reports of September 3rd, 7th, and 10th the fact that Mykytiuk had actually raped her.[8] Ralph returned to Florida to interview Walton further, and heard for the first time additional allegations previously withheld.

Walton told Ralph that, in addition to the "hugs and kisses" in mid-June that she had reported in her initial complaint, on June 29, 1999, she had followed Mykytiuk home from an evening business meeting at a restaurant because he said he was drunk. Despite Mykytiuk's sexual advances two weeks earlier, Walton went upstairs with Mykytiuk to his apartment, and accepted some wine from him as he began talking again about his personal life. According to Walton, after they had

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[7] In July 1999, Walton had learned that Dr. Cervenka was treating Mykytiuk in connection with his divorce remorse, and Walton began to see Dr. Cervenka herself. On July 26, 1999, Walton said she and Mykytiuk visited Dr. Cervenka together in a "conjoint session," during which Walton said she wanted to end her affair with Mykytiuk and restore professional "boundaries." Walton and Mykytiuk made a "30-day agreement," recorded in Dr. Cervenka's clinical notes, agreeing to restore their relationship to a professional level. Walton acknowledged that she never told Dr. Cervenka that Mykytiuk had raped her.

[8] Also on September 20, Walton reported the alleged rapes to the Tampa Police Department. The police department investigated Walton's allegations, and decided not to prosecute the claim.

talked awhile, Mykytiuk jumped on top of her on the couch and raped her. Walton also reported that Mykytiuk later carried her into his bedroom and again forced her to have sex with him. Although she says he showed her a gun, there is no evidence that Mykytiuk used the gun in any way to coerce her.

Walton also told Ralph that, on July 8, 1999, she once again gave Mykytiuk a ride to his apartment after a lunch business meeting. Again, Walton went upstairs and accepted wine from Mykytiuk. Mykytiuk said that Walton needed to relax, and began rubbing her shoulders. He invited her to lie down on the floor so he could rub her back and shoulders. Walton lay down on her stomach on his living room floor; he rubbed her back for awhile and then, she says, he raped her again.

Walton also reported additional alleged harassing behavior to Ralph. According to Walton, on August 21, 1999, she rode with Mykytiuk to a conference in Orlando. During the conference, Mykytiuk invited Walton to his hotel room to review her "good sales numbers." Despite her prior experiences, now including multiple forced rapes, she went to his hotel room, where he hugged and kissed her and touched her breasts and buttocks over her objection. Walton also reported that, on August 26, 1999, after a business dinner, Mykytiuk pressed her for sex and tried to kiss and hug her again.

Walton reported that, the next day, on August 27, 1999, after she gave Mykytiuk a ride home from a business meeting, she went up to his apartment to use the restroom. Walton says Mykytiuk handed her a "Victoria's Secret" catalogue and told her to pick something out for herself.

The investigation also revealed that, during the course of the summer of 1999, Walton had conversations with at least three people about Mykytiuk. In July 1999, Walton advised her close friend, Kim Van Goidstnoven, that Mykytiuk was

paying too much attention to her and had tried to hug and kiss her. Van Goidstnoven consulted with her managers in another company (also a Johnson & Johnson subsidiary). In mid-August, she reported back to Walton that they advised her that Walton should go to the Human Resources Department, consistent with the direction in her employee handbook. Walton also had a conversation with her husband about being concerned over Mykytiuk's excessive attention, and he recommended that she go to Human Resources to report the matter. Finally, she discussed the matter with her neighbor, who also advised her to go to Human Resources. None of these conversations included allegations of rape. Moreover, Walton did not follow the consistent encouragement to report her complaint to Ortho's Human Resources Department during the entire summer of 1999, despite her allegations that Mykytiuk twice raped her and continued to harass her throughout that time.

Ortho's post-September 17, 1999, investigation expanded because of Walton's rape charge. The investigators returned and questioned Mykytiuk again, and he supplied them with detailed information intended to demonstrate that he had shared an intimate relationship with Walton.

Ralph and Saleeba also conducted interviews of multiple other people in an attempt to evaluate Walton's new charge of forcible rape in the context of her behavior and Mykytiuk's descriptions, which seemed consistent with an intimate personal relationship. They concluded that, for some period, Walton and Mykytiuk may have become involved in a sexual affair that was voluntary and welcome, and that Mykytiuk had not been guilty of raping her. The information on which they based this conclusion included confirmation of the intimate details Mykytiuk reported; the peculiar history of Walton's reports; Walton's behavior in accepting a key to Mykytiuk's apartment and repeatedly visiting the apartment even after the alleged rapes; telephone conversations tape

recorded by Mykytiuk's estranged wife Shelly Skinner, in which Walton offered to collude with Skinner in Skinner's child custody dispute with Mykytiuk; the clinical notes of Dr. Cervenka indicating a consensual affair; and the decision by the State of Florida not to prosecute Mykytiuk.

Nevertheless, Ralph and Saleeba recommended to Ortho's vice president for Human Resources that Mykytiuk be discharged because of his poor judgment in taking an employee away from her work for personal gratification and developing a sexual relationship with a married subordinate. Mykytiuk already had been on suspension since September 13, 1999, and was formally discharged on December 31, 1999.

C. The Proceedings Below

After full briefing and oral argument, the United States Court of Appeals for the Eleventh Circuit, in a *per curiam* decision, affirmed the district court's Order granting summary judgment for Ortho on all of Walton's claims. With respect to Walton's sexual harassment claim, the Court of Appeals expressly analyzed the question of Ortho's liability for Mykytiuk's harassment and, specifically, whether Walton's discharge in May of 2000 was a "tangible employment action," under the principles established in *Ellerth* and *Faragher*.

The Court of Appeals found that termination of Walton's employment was a tangible employment action, but that there was no causal link between the harassment and Walton's termination because there was no evidence that Walton was terminated (as opposed to being harassed) because of her sex. The Court of Appeals acknowledged that Mykytiuk's conduct could be imputed to Ortho,[9] but stated that Mykytiuk had played no role in the termination. Accordingly, the Court of

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[9] Ortho conceded this point in the district court solely for summary judgment analysis.

Appeals held that Walton's termination in order to preserve her eligibility for long-term disability benefits did not preclude Ortho from relying on the affirmative defense to avoid liability for the earlier harassment. It then found that both prongs of the affirmative defense were met, and, thus, concluded that Ortho could not be held liable for Mykytiuk's harassment of Walton.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE STANDARDS FOR EMPLOYER LIABILITY ALREADY DECIDED IN *ELLERTH* AND *FARAGHER*

The Court already has addressed, in detail, the standards for employer liability for sexual harassment by a supervisor in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Walton does not and cannot show that the Court of Appeals deviated from those standards, or that there is any argument, appropriately vetted in the lower courts, that requires this Court's attention by way of certiorari review.

As the Court of Appeals recognized, the only basis for Walton's argument in the district court that she suffered a tangible employment action was her removal from active employment status in May of 2000 (eight months after the sexual harassment had ended and Mykytiuk had been removed from the workplace). *Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272, 1283 n.10 (11th Cir. 2003). Walton could not have argued otherwise, given that she undisputedly worked in the same position with the same pay and benefits until she elected to go on short-term disability leave after belatedly complaining of sexual harassment, and given that Ortho eliminated any possibility that Mykytiuk's harassment could culminate in a tangible employment action by promptly suspending him. Again, the workplace to which

Ortho invited her to return was the one in which she had prospered for ten years prior to Mykytiuk's employment, and with the added security Ortho had provided by removing him.

The Court of Appeals properly applied the principles of *Ellerth* and *Faragher* to hold that Walton's May 2000 termination did not deprive Ortho of the affirmative defense as to its supervisor's earlier conduct. It then held that the record evidence supported the application of both prongs of the affirmative defense—that Ortho had acted reasonably to prevent and correct the sexually harassing behavior, and that Walton had unreasonably failed to afford herself of Ortho's complaint procedures or to otherwise avoid harm.

Now, Walton contends that the Court should review the Court of Appeals' decision to determine whether *the sexual harassment itself* (or some of it) was a tangible employment action. She argues that an employee should not even have to face the affirmative defense (*i.e.,* should be entitled to a finding of a tangible employment action as a matter of law) if the sexual harassment renders the employee disabled and she did not act unreasonably in failing to report sexually harassing acts prior to a rape. This argument was raised for the first time in Walton's reply brief in the Court of Appeals. For that reason, the argument was not considered by the Court of Appeals, *see Walton*, 347 F.3d at 1283 n.10, and cannot serve as a basis for certiorari review by this Court. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 33-35 (2001).

Moreover, even assuming such a theory might have substance on another record, this case does not present it. The Court of Appeals' description of the "unreasonableness" of Walton's failure to report the harassment after it began in June illustrates this point:

> Had Walton notified Ortho officials in June, when the harassment initially began, most of the incidents complained of could have been avoided. Instead, after

> Mykytiuk had groped her breasts and buttocks and tried to kiss her the day after he promised to behave, Walton claims that she went back to his apartment over a week later, knowing that he was intoxicated, had wine with him, and was then subjected to the more serious incident of sexual assault. Indeed, she admits returning to the apartment the following week, accepting wine again, and lying down on the floor to be massaged, whereupon she alleges that she was sexually assaulted again. . . . Here, Walton could have avoided most, if not all, of the actionable harassment by reporting Mykytiuk's behavior to Ortho officials. By failing to do so, Walton did not give Ortho the opportunity to address the situation and prevent further harm from occurring.

Walton, 347 F.3d at 1290. Walton's "argument" in her petition is merely an expression of her disagreement with these findings of the Court of Appeals, and does not support an issue appropriate for the Court's review.[10]

In summary, the question presented by Walton does not warrant certiorari review because it was not properly advanced below, and because the uncontroverted facts establish that Walton had sufficient time, notice and protection after the first two instances of Mykytiuk's misconduct, to obtain prompt, effective and complete

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[10] The only two cases Walton cites in her petition address situations where the courts have already found the affirmative defense to apply because there is no tangible employment action, and are evaluating whether the employee's failure to avoid harm (the second prong of the defense) is excusable because of the suddenness of the event. As the Court of Appeals recognized, the theory addressed in those cases—sometimes called the "sudden sexual harassment" theory—was not raised in the district court. *Walton*, 347 F.3d at 1291. Moreover, it provides no support for Walton's request that the Court review the analytically distinct issue of whether she suffered a tangible employment action and is not supported by the facts of this record.

protection. As this Court has held, that is the core purpose of Title VII and Ortho's conduct was sufficient to that purpose.

II. THE PETITION DOES NOT AND CANNOT SHOW ANY CONFLICTAMONG THE COURTS OF APPEAL

The petition also should be denied because Walton does not and cannot show any conflict between the Court of Appeals' decision here and any decision of the other Courts of Appeal, nor does she identify any important or controversial federal question raised by the decision. In fact, the factual circumstances of the case and the legal argument presented by Walton below (in which the plaintiff claims to have been disabled as a result of the harassment, but cannot and does not claim constructive discharge) do not often appear in reported decisions.[11]

Other Courts of Appeal have considered the analogous situation where a plaintiff has been terminated after having been harassed, but the harassing supervisor played no role in the decision to terminate. Those decisions are consistent with the decision here in finding that the sexual harassment did not culminate in a tangible employment action. *See Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000) (employee's termination after having been subjected to sexual harassment was not a culminating tangible employment action because: (1) supervisor did not use his authority to get employee fired; (2) he was not her supervisor at the time of her termination; and (3) he played no role in the decision to discharge plaintiff); *Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000) (harassed employee did not suffer tangible employment action when he was rendered ineligible to participate in management program based on poor evaluation because his

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[11] A district court decision from Kansas was decided consistent with this case. *See Desmarteau v. City of Wichita*, 64 F.Supp. 2d 1067, 1078-79 (D. Kan. 1999).

participation was blocked not by evaluation from supervisor who harassed him, but by another supervisor's subsequent evaluation).

CONCLUSION

The decision in this case did not deviate in any way from the established law of employer liability for harassment. The only thing remarkable about this case is Walton's own behavior in failing to report Mykytiuk's initial kisses and sexual touchings when they occurred, and, instead, continuing unnecessarily to place herself in situations that permitted further harassment, including two alleged rapes. The Court of Appeals properly dealt with the facts of this case under the principles of *Ellerth* and *Faragher*. No further review of the Court of Appeals' decision is warranted. For all of the reasons set forth herein, Ortho requests that this Honorable Court deny the petition.

Respectfully submitted,

TERENCE G. CONNOR
LISA R. ASKOWITZ
MORGAN, LEWIS & BOCKIUS LLP
200 South Biscayne Boulevard
Miami, FL 33131-2339
(305) 415-3000

HARRY RISSETTO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
(202) 739-3000

Attorneys for Respondents